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Lydia Nussbaum

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# MEDIATION AS REGULATION: EXPANDING STATE GOVERNANCE OVER PRIVATE DISPUTES

Lydia Nussbaum\*

## *Abstract*

*Across the United States, state legislatures are issuing new mediation mandates that govern how private parties resolve their disputes. Legislatures embed these mediation mandates into specific statutory regimes ranging from foreclosure to health care to insurance coverage. Rather than leave decisions about ADR design to other state institutions, like courts or administrative agencies, legislatures increasingly retain that authority and formalize the mediation process with legal requirements that regulate parties' behavior and influence mediation outcomes. This Article explains how legislatures wield mediation as a regulatory tool in this latest phase of mediation's institutionalization. It argues that statutory mediation mandates should be viewed as a form of decentralized governance, a paradigm that reconfigures the relationship between public and private spheres of power. Viewing these mandates as decentralized governance reveals what can be helpful, and also problematic, about formalizing mediation and underscores why legislatures must exercise care when designing procedural architecture.*

## I. INTRODUCTION

Mediation is a familiar fixture in many American legal institutions but its role is changing. When disputants bring their grievances to courts and administrative agencies, they are encouraged—often required—to participate in mediation, a private and confidential meeting where the disputing parties work together, with a neutral third party, to try to resolve their differences.<sup>1</sup> In recent years, however, legislation requiring mediation, particularly at the state level, has expanded in scope and in complexity. State legislatures obligate private parties to mediate certain types of disputes, sometimes formalizing the process in statute and

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\* © 2016 Lydia Nussbaum. Associate Professor of Law and Associate Director of the Saltman Center for Conflict Resolution, William S. Boyd School of Law, University of Nevada, Las Vegas. I am grateful to Jean Sternlight, Rob Robinson, Fatma Marouf, Katie Loncarich Hennessey, and John Lande for reading and commenting on earlier versions of this paper. I also extend my sincere appreciation to the William S. Boyd School of Law for supporting my research.

<sup>1</sup> See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* app. A (2013–2014 ed. 2013) (cataloguing statutes from all U.S. jurisdictions that contain “mediation” and “conciliation”).

sometimes requiring mediation before parties may turn to state institutions for assistance. As a result, mediation has become a new vehicle for state intervention that redraws old boundaries between public and private dispute resolution.

Statutory mediation mandates fall into two categories. In one, legislators embed mediation requirements into statutory regimes, forcing parties to mediate when certain substantive legal rights are at stake. For example, in some states, patients who believe they are victims of medical malpractice,<sup>2</sup> parties that cannot agree on terms modifying a beer-distribution contract,<sup>3</sup> and nursing mothers seeking to enforce their rights under a state Workplace Accommodations Act<sup>4</sup> all must mediate before they can initiate formal claims. In the second category, legislatures not only require mediation, but also control how parties mediate. A Maine statute requires lenders and homeowners to attend foreclosure mediation and, during the mediation session, complete worksheets to determine the homeowner's eligibility for a loan modification.<sup>5</sup> California's statute mandating mediation of insurance coverage disputes prohibits the insurers' legal counsel from attending mediation if the insured party lacks legal representation.<sup>6</sup> Both categories of mediation statutes constitute legislative regulation of parties' negotiation behavior and an effort to influence dispute resolution outcomes.<sup>7</sup>

State statutes that compel mediation or particularize the mediation process signal a new phase in mediation's institutionalization. Ordinarily, federal and state legislatures give courts and administrative agencies discretion in designing mediation programs and establishing guidelines for parties and mediators. While others have written about court-connected mediation programs requiring litigants to mediate,<sup>8</sup> little attention has been paid to legislatures' role in mandating mediation for private disputes and the regulatory nature of those mandates.<sup>9</sup>

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<sup>2</sup> S.C. CODE ANN. § 15-79-125 (Supp. 2015); WASH. REV. CODE ANN. § 7.70.100 (West 2007).

<sup>3</sup> MD. CODE ANN. art. 2B, § 21-103 (West, Westlaw through 2008 Act 2008).

<sup>4</sup> COLO. REV. STAT. § 8-13.5-104(5) (2012).

<sup>5</sup> ME. REV. STAT. ANN. tit. 14, § 6321-A (2014).

<sup>6</sup> CAL. INS. CODE § 10089.80 (West 2013).

<sup>7</sup> The relationship between state authority and informal justice has been explored elsewhere. See 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 267–75 (Richard L. Abel ed., 1982). Abel and the contributors to his edited volumes discuss, often with skepticism, the extent to which informal dispute resolution can really exist free of state control. Whereas Abel explores the delegitimation of formal dispute resolution processes, the focus of this Article is on a different phenomenon: state efforts to formalize an informal procedure like mediation. Furthermore, the Article concentrates on the statutory language itself and does not conduct empirical analysis of whether there are gaps between the law on the books and parties' behavior on the ground.

<sup>8</sup> See, e.g., Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 138–39 (2004); Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 627–34 (2002); Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 246–49 (2006); Peter N. Thompson, *Good Faith Mediation in*

Why is a process like mediation, classically characterized by privacy, informality, a lack of prefabricated structure, and participant-driven resolution, being deployed in such a structured, rule-based way? While no clear legislative intent emerges from states deploying mediation as a regulatory tool, one possible explanation for this new frontier in state regulation of dispute resolution comes from governance theory.

Governance theory explores the relationship between governments and the governed.<sup>10</sup> There are many different models for characterizing this relationship; for example, a government can be interventionist in its regulatory approach or it can be laissez-faire. But a third model of regulatory governance, which some have called “decentralized,” “reflexive,” “responsive,” “procedural,” or “libertarian paternalism,”<sup>11</sup> is particularly relevant to understanding legislative mediation mandates. The animating theory behind decentralized governance is that states can advance social welfare by restoring some autonomy and decision-making power to regulated entities. States effectuate decentralized governance, not by erasing regulation altogether (which would be de-regulation), but by constructing new processes in which regulated actors must participate.

This Article argues that statutory mediation mandates should be characterized as decentralized governance because it best describes the changing relationship between the state and private actors when it comes to dispute resolution. Statutory mediation mandates relocate authority over dispute resolution from the state to private parties, creating opportunities for disputants to negotiate directly and resolve their conflicts without state adjudication yet within procedural parameters laid down by the state. Formalizing private parties’ dispute processing through the procedural architecture of decentralized governance can promote (more) balanced negotiations between parties than might otherwise occur. However, it also has the potential to burden parties with additional complexity and, where disputants have mismatched negotiation power, place the vulnerable party at a disadvantage. Legislatures, therefore, must be purposeful when issuing mediation mandates in substantive law and formalizing elements of the mediation process. By recognizing the existence of these new state intrusions into the traditionally private sphere of

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*the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363, 378–85 (2011). For a discussion of how mediation has been integrated at the federal level, see Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. DISP. RESOL. 79, 79–86 (2000).

<sup>9</sup> With the exception of a 1986 symposium, *Proposed Legislation on Critical Issues in Mediation*, which focused on regulation of mediators and the mediation process (e.g., confidentiality, enforceability of mediated agreements, mediator privilege and immunity) and a handful of subject-specific articles on environmental dispute resolution or special education dispute resolution, the author found no articles that examined the integration of mediation into state legislative statutory regimes. Symposium, *Proposed Legislation on Critical Issues in Mediation*, 2 OHIO ST. J. ON DISP. RESOL. 121, 121–27 (1986).

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part V.C.

mediation, legislatures can take care to enhance, rather than erode, fairness and justice.

The Article is organized in six parts. Part II begins by explaining classical mediation's unique characteristics and how it differs from other dispute resolution processes like public adjudication and private arbitration. Part III then discusses why mediation became "institutionalized" in the American legal system as a tool for judicial reform. Part IV explores the latest phase in mediation's institutionalization: substantive statutes with embedded mediation requirements, some of which also regulate parties' behavior and influence mediation outcomes by formalizing different dimensions of the mediation process. Part V argues that this phenomenon should be understood as decentralized governance. Part VI argues that while these statutory mediation mandates may provide private parties greater authority over dispute resolution outcomes, formalizing mediation can be problematic. It therefore concludes with recommendations to policymakers about how to formalize mediation so that it can be beneficial and not harmful to parties.

## II. MEDIATION, CLASSICALLY SPEAKING

Before embarking on a discussion of mediation's formalization, this Article must first clarify: *what is mediation?* This Part sets out mediation's core principles and identifies the classic characteristics that distinguish it from other dispute resolution processes.

Mediation brings disputing parties together with a third party who helps them identify issues of concern, overcome communication barriers, and explore possible options for resolving the dispute.<sup>12</sup> The mediation process can look very different depending on its context. Like the finches Charles Darwin observed inhabiting the Galapagos Islands,<sup>13</sup> the mediation process adapts to its unique environment,<sup>14</sup> the

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<sup>12</sup> 4 AM. JUR. 2D *Alternative Dispute Resolution* § 6 (2007) (citing GRENIG & DAVIES, *ALTERNATIVE DISPUTE RESOLUTION* § 2:16). The drafters of the Uniform Mediation Act, with input from mediation practitioners and scholars around the country, defined mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." NAT'L CONF. OF COMM'RS OF UNIF. ST. LAWS, UNIF. MEDIATION ACT § 2(1) (2003), [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) [<https://perma.cc/DYX8-8LCV>].

<sup>13</sup> Charles Darwin recorded the tremendous variety of finch species living on the Galapagos Islands, each finch having developed unique characteristics that allowed it to thrive in its particular island environment. Despite their differences, all of the birds still belonged to same family of birds, Thraupidae or tanagers (although this placement in the tanager family is a matter of debate). See Kevin J. Burns et al., *Phylogenetics and Diversification of Tanagers (Passeriformes: Thraupidae), the Largest Radiation of Neotropical Songbirds*, 75 *MOLECULAR PHYLOGENETICS & EVOLUTION* 41, 58 (2014).

<sup>14</sup> JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2d ed. 2006) (discussing mediation of different kinds of legal and nonlegal disputes); see also David

nature of the dispute,<sup>15</sup> the parties,<sup>16</sup> whether the parties have legal representation,<sup>17</sup> and the mediator.<sup>18</sup> Thus, the term “mediation” can denote a range of different processes, each operating according to different philosophies about the objectives of the process itself and the mediator’s role in furthering those objectives.<sup>19</sup> For example, mediators debate how a mediator helps disputants resolve conflicts in a neutral way<sup>20</sup> and whether a mediator should utilize techniques considered “facilitative,”<sup>21</sup> “transformative,”<sup>22</sup> “evaluative,”<sup>23</sup> or a combination of these different approaches.<sup>24</sup>

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Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 382–83 (1988) (stating that generalizations about ADR prove “loose and imperfect” because there are so many varieties).

<sup>15</sup> Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707–14 (1997) (categorizing mediators’ approaches as “norm-generating,” “norm-educating,” or “norm-advocating”); see also Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 40–44 (1981) (noting that in disputes over environmental quality or natural resources, mediators bear special responsibility to ensure that settlements reached are in the public’s interest).

<sup>16</sup> Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 170–73 (2002) (stating that decisions to mediate are highly individualized and depend on the particular interests and dynamics of the parties); see also Dean B. Thomson, *A Disconnect of Supply and Demand: Survey of Forum Members’ Mediation Preferences*, 21 CONSTRUCTION LAW. 17, 20–21 (2001) (pointing out that a survey of the construction industry shows that parties prefer a particular style of mediation).

<sup>17</sup> Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L.J. 381, 383 (2010).

<sup>18</sup> James Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991) (highlighting interviews with different court-connected mediators that demonstrate that their professional backgrounds influence their mediation approach; for example, those who are retired judges are most likely to “bash” out an agreement between the parties).

<sup>19</sup> Jay Folberg notes that “[f]orms of conflict resolution in which a third party helps disputants to resolve their conflicts and reach a decision of their own has probably been practiced since there were three people on earth.” Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1983 MEDIATION Q. 3, at 3–4 (1983).

<sup>20</sup> Neutrality in the mediation context is generally taken to mean that the mediator has no conflicts of interest or bias toward any party. See UNIF. MEDIATION ACT § 9, cmts, *supra* note 12. The mediation community has not reached consensus, however, about how the mediator actually assists parties in a neutral way and whether mediators can still be neutral while having an agenda of their own, such as the objective to obtain settlement. See, e.g., Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 94–97 (1981) (noting that among many other qualities, a mediator must be neutral with regard to outcome because that is how she develops a bond of trust with the parties and ensures that parties’ substantive interests are not jeopardized).

<sup>21</sup> Facilitative mediators often see their role as asking questions of the parties,

These different species of mediation, however, all share common traits that make mediation distinct from other dispute resolution processes: 1) mediation employs a horizontal structure; 2) all outcomes require consensus; and 3) discussions are confidential.

First, mediation occurs horizontally, between parties, rather than handed down vertically from a third-party decision maker.<sup>25</sup> As Lon Fuller wrote, mediation's central quality is

its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.<sup>26</sup>

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exploring interests underlying the conflict, and facilitating discussion about how the conflict can be resolved. *See, e.g.,* Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 991–92 (1997); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 106, 108 (1998).

<sup>22</sup> Transformative mediators focus on improving the quality of communication between the parties in dispute and less on how to arrive at settlement. *See, e.g.,* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 263–64 (1989).

<sup>23</sup> Evaluative mediators often rely heavily on separate caucus meetings with the individual parties in order to help the parties analyze the strengths and weaknesses of their legal positions and predict outcomes of court or other processes. *See, e.g.,* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 27–28 (1996); James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, from an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769, 796 (2000).

<sup>24</sup> Others have noted that different approaches to the mediator's role are not mutually exclusive and can be combined in sophisticated ways. *See, e.g.,* Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 29–49 (2003); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 951–54 (1997); Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 432–41 (2009). However, a number of processes may be labeled mediation when they are in fact more like arbitration or some other form of dispute resolution. *See, e.g.,* Julie Heintz, *Mediating Instead of "Mediating,"* 75 U. DET. MERCY L. REV. 333, 334–35 (1998); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 946–48 (1997).

<sup>25</sup> Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177–178, 180 (1994) ("Vertical" models of justice rely upon hierarchies and power in which a "decision is dictated from on high by the judge" while "horizontal" models of justice are based on "equality and the full participation of disputants in a final decision.").

<sup>26</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). The way in which mediators actualize this "reorientation" can vary widely. *See*

A mediator, rather than creating rules by which disputing parties will be bound, “induce[s] the mutual trust and understanding that will enable the parties to work out their own rules. The creation of rules is a process that cannot itself be rule-bound . . . .”<sup>27</sup>

Second, and relatedly, parties in mediation make their own autonomous decisions about whether and how to resolve their dispute. Both parties must mutually agree to any terms of agreement, making mediation a “consensual” dispute resolution process.<sup>28</sup> Like direct party negotiations, classical mediation requires consensus for resolution—scholars and practitioners often refer to mediation as “problem-solving,” rather than oppositional, because at the end of the day the parties need each other to agree to resolution.<sup>29</sup>

And third, mediation discussions are confidential.<sup>30</sup> Unlike formal hearings, the only written record of a classical mediation session consists of a signed confidentiality agreement and, if the parties decide to resolve their dispute and formalize the resolution in writing, a written agreement. Although practices do vary, in the classical vision of mediation, the mediator does not make recommendations to entities outside the mediation or report on mediation

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*supra* notes 21–24. For a creative analysis identifying the origins of diverse mediation models in legal movements of the twentieth century, see Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 CARDOZO J. CONFLICT RESOL. 1, 4–18 (2009).

<sup>27</sup> Fuller, *supra* note 26, at 326.

<sup>28</sup> A “consensual process” is one in which disputants retain the ability to consent to ultimate resolution (e.g., fact finding, negotiation, mediation, conciliation) whereas an “adjudicatory process” is one in which disputants surrender the power to decide the end result to a third-party decision maker (e.g., administrative hearings, arbitration, judicial decision making). John S. Murray, *Guideposts for an Institutional Framework of Consensual Dispute Processing*, 1984 J. DISP. RESOL. 45, 48–49 (1984). However, processes that are consensus-based in theory may not operate that way in practice. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L. Q. 787, 846–51 (2001).

<sup>29</sup> See generally Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (contrasting an adversarial-individualistic-competitive approach to negotiation with an interest-based, problem-solving approach).

<sup>30</sup> COLE ET AL., *supra* note 1, at app. A. The Uniform Mediation Act attempted to inject some uniformity in state laws governing mediation privileges and admissibility of mediation. UNIF. MEDIATION ACT §§ 4, 5, 6, 8–12, *supra* note 12. Parties also contract for confidentiality when they sign agreements to mediate, although these contractual confidentiality clauses vary in scope and are vulnerable to the same legal challenges as other private contracts.



discussions in any other forum.<sup>31</sup> The hope is that parties will participate candidly and without fear of retribution as a result of what is said in mediation.<sup>32</sup> Because of confidentiality, it is presumed that parties will be more likely to exchange information and make disclosures, especially information that goes against their self-interest.<sup>33</sup>

These core principles of mediation make it distinct from other forms of dispute resolution. Compared with adversarial processes like binding arbitration or adjudication, in mediation parties do not face a win-lose contest<sup>34</sup> and the mediator has no authority to render a decision or make binding findings of fact.<sup>35</sup> Mediation discussions often unfold in an informal, unstructured way, without procedural rules about who can speak, what they say, or when and how they say it.<sup>36</sup> Unlike

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<sup>31</sup> Some state laws carve out some public-policy exceptions to confidentiality, for example, in cases of child abuse. Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 273 (2006).

<sup>32</sup> See, e.g., Maryland's Mediation Confidentiality Act, MD. CODE ANN., CTS. & JUD. PROC. § 3-1801 (West 2012). For a discussion of the policy reasons behind confidentiality of mediation communications and mediator privilege, see UNIF. MEDIATION ACT, prefatory n., *supra* note 12.

<sup>33</sup> Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 81–82 (2001) (emphasizing that mediation's goal is to effectuate communication between adversarial parties who do not trust each other; confidentiality makes this communication possible by removing the threat that disclosures against party self-interest can later be used against them); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 37–38 (1986) (explaining that confidentiality is a vital ingredient to mediation because, among other things, it provides privacy, enables parties to be candid about deep-seated feelings, and protects unsophisticated parties).

<sup>34</sup> Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 855–58 (2004) (discussing how litigation resolves conflict by identifying one party as the winner in a contest of competing morality tales whereas mediation, by framing conflict as a byproduct of normal human conduct rather than a “disruption of the moral order,” uses party collaboration to achieve common ground and resolve conflict).

<sup>35</sup> LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 15 (3d ed. 2005). Often, in the context of the courts, the purpose of the mediation and the role of the mediator are outlined as assisting parties with communication. See, e.g., FLA. STAT. ANN. § 44.403(4) (West 2004) (“The mediator’s role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.”). But see Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 86 n.128 (2012) (explaining how “med-arb” is a hybrid process that begins as mediation and, should any issues not be resolved successfully by the parties themselves, ends with the neutral third party deciding the matter).

<sup>36</sup> There may be unspoken rules about mediation procedure, for example asking the complainant to open the discussion, but these are not formalized in law like other procedures that govern the order of closing statements (FED. R. CRIM. P. 29.1), witness

arbitration, where an arbitrator issues a decision that may or may not be binding on the parties, mediation gives parties and their representatives space to decide what arrangements make the most sense for their situation and create tailor-made solutions; thus, even with similar facts and the same legal standards, mediation outcomes can be different.<sup>37</sup> Moreover, unlike settlement conferences or early neutral evaluation, there need not be a court case for parties to mediate.<sup>38</sup> Thus, what defines mediation is its informality and adaptability, and it is these qualities that led to its institutionalization.

### III. MEDIATION BECOMES INSTITUTIONALIZED

Mediation has become an integral part of the American legal system over the past 30 years.<sup>39</sup> Once limited to collective bargaining<sup>40</sup> and divorce,<sup>41</sup> mediation

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examination (FED. R. EVID. 611) or courtroom behavior (MISS. UNIF. R. P. JUST. CT. 1.18 (prohibiting behavior intended to irritate or annoy, requiring attorneys and parties to refrain from making “quips,” etc.)). Formal rules are not the bailiwick of courts alone, but also extend to private dispute resolution processes like arbitration. *See* American Arbitration Association Rules of Procedure, to which parties agree by contract. American Arbitration Association, [www.adr.org \[https://perma.cc/98Y2-HM2Q\]](https://perma.cc/98Y2-HM2Q).

<sup>37</sup> Some have compared mediation’s capacity for “individualized justice” to the equity courts of yore. *See* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 329 (2005) (noting ADR can fill in for individualized justice and procedural flexibility, components currently missing from our contemporary civil justice system); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58 n.14 (2004) (citing Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1, 3 (1991)); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244, 245–46 (2002).

<sup>38</sup> Both settlement conferences and early neutral evaluation, commonly used for civil cases in state and federal courts, utilize judges, magistrate judges, or attorneys, to serve as a third-party neutral who evaluates strengths and weaknesses of parties’ legal positions and explores obstacles to settlement. Some early neutral evaluators will also issue a nonbinding appraisal of the case’s merits. *The ABCs of ADR: A Dispute Resolution Glossary*, 13 ALTERNATIVES HIGH COST LITIG. 147, 149–50 (1995).

<sup>39</sup> Court-connected mediation exists in all fifty states and the federal government. *Court ADR Across the U.S.*, RSI’S COURT ADR RESOURCE CENTER (Jan. 25, 2016, 6:54 PM), <http://courtadr.org/court-adr-across-the-us/> [https://perma.cc/EH98-99NV]; Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58 (2012). *See also* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 185–88 (2003); GOOGLE NGRAM VIEWER, <https://books.google.com/ngrams> [https://perma.cc/N9A4-BAE4] (type “mediation” into the graph-phrase query; then enter “1800” and “2010” in the time span fields; then use the cursor to hover over the graph until the year 1975 is visible) (displaying a Google Ngram chart tracking the use of the word “mediation” between 1800 and 2010 that shows the steepest increase starting in 1975 and leveling out in 2003).

now has widespread application in a range of disputes: small claims,<sup>42</sup> family,<sup>43</sup> business,<sup>44</sup> probate,<sup>45</sup> guardianship,<sup>46</sup> personal injury,<sup>47</sup> medical malpractice,<sup>48</sup>

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<sup>40</sup> The federal government created the Federal Mediation and Conciliation Service in 1947 to “aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions.” 29 U.S.C. § 171 (2012). States also established their own public agencies to assist with mediating labor disputes. *E.g.*, 24 PA. CONS. STAT. § 11-1121-A; Public Employee Relation Act of 1970, 43 PA. CONS. STAT. § 1101.101 (2009).

<sup>41</sup> California first began using court-connected “conciliation” services in 1939 primarily as a means to keep married couples together through reconciliation rather than to help them divorce. Jay Folberg, Ann L. Milne & Peter Salem, *The Evolution of Divorce and Family Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 4–7 (Jay Folberg, Ann L. Milne & Peter Salem eds., 2004).

<sup>42</sup> *E.g.*, Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RESOL. 55, 56 (1993).

<sup>43</sup> Mediation is used for matters involving child custody, divorce finances, child dependency, and postadoption contact arrangements. *See, e.g.*, ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 54–62 (2004); Kelly Browe Olson, *Lessons Learned from a Child Protection Mediation Program: If at First You Succeed and Then You Don’t...*, 41 FAM. CT. REV. 480, 480–81 (2003); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1498–1507 (1992).

<sup>44</sup> *See, e.g.*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 18–19, 44–51 (2014); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 4–6 (1998).

<sup>45</sup> Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 256 (2001) (citing Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 423–31 (1997)) (explaining that mediation, unlike litigation, maintains privacy in probate disputes and creates opportunities for family reconciliation).

<sup>46</sup> *See, e.g.*, Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 616–21 (2002); Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 805–08 (2001).

<sup>47</sup> Personal injury cases comprised 69% of civil cases from one study of court-annexed mediation in Ohio, the overwhelming majority involving automobile accidents. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 652–53 (2002). For a discussion of mediation in the mass torts context, see Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1619–26 (1995).

<sup>48</sup> Proponents of mediating medical negligence cases attest that mediation can repair dysfunctional communication between patients (or patient families) and health care providers, as well as improve patient safety. Eric Galton, *Mediation of Medical Negligence Claims*, 28 CAP. U. L. REV. 321, 321–24 (2000); Chris Stern Hyman, *Mediation and*

labor and employment,<sup>49</sup> education,<sup>50</sup> bioethics,<sup>51</sup> environmental,<sup>52</sup> community,<sup>53</sup> and in criminal cases.<sup>54</sup> Now mediation is connected with state and federal courts

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*Medical Malpractice: Why Plaintiffs, Hospitals and Physicians Should Be at the Table*, 66 DISP. RESOL. J. 32, 32–33 (2011); Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*, 74 L. & CONTEMP. PROBS. 135, 136 (2011). Others suggest that face-to-face, interest-based discussions in mediation are the exception, not the rule. See Sheila M. Johnson, *A Medical Malpractice Litigator Proposes Mediation*, 52 DISP. RESOL. J. 42, 45–46 (1997) (noting that what states like Wisconsin call “mediation” is instead a prescreening or evaluation process, designed to weed out claims without legal merit); Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 446 (2007). For example, some critics point to the incentives that make doctors disinclined to settle claims. Haavi Morreim, *Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank*, 27 OHIO ST. J. ON DISP. RESOL. 109, 111–13 (2012).

<sup>49</sup> See, e.g., Lisa Blomgren Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service*, in TRANSFORMATIVE MEDIATION: A SOURCEBOOK, RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS 321 (Joseph P. Folger et al. eds., 2010); Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L. J. 523, 525 (1987); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1405–06 (2004); Carrie Menkel-Meadow, *The NLRA’s Legacy: Collective or Individual Dispute Resolution or Not?*, 26 A.B.A. J. LAB. & EMP. L. 249, 249 (2011).

<sup>50</sup> Under the federal Individuals with Disabilities Education Act (IDEA), states must provide procedures like mediation to address and resolve complaints involving a child’s individualized education plan. 20 U.S.C. § 1415 (2012); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 612–19 (2004). For a discussion of peer mediation in schools, see Nancy A. Burrell, Cindy S. Zirbel & Mike Allen, *Evaluating Peer Mediation Outcomes in Educational Settings: A Meta-Analytic Review*, 21 CONFLICT RESOL. Q. 7, 7–8 (2003).

<sup>51</sup> See generally NANCY NEVELOFF DUBLER & CAROL B. LIEBMAN, *BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS* xiii–xiv (rev. and expanded ed., 2004) (arguing mediation can be a forum for physicians, patients, and families to communicate and together make decisions about life and death).

<sup>52</sup> See generally LAWRENCE S. BACOW & MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* (1984). For a case study of mediation as public policy, see Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy—For a Time*, 67 U. COLO. L. REV. 259, 259–61 (1996).

<sup>53</sup> See Sally Engle Merry & Neal Milner, *Introduction to THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 4 (Sally Engle Merry & Neal Milner eds., 1993). Community mediation centers often address disputes early, before court intervention, or disputes that, for whatever reason, do not fall within the jurisdiction of the courts or public agencies. See, e.g., Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1689–91 (1997).

and at both trial and appellate levels. Mediation is also used by many administrative agencies in their quasi-judicial<sup>55</sup> and quasi-legislative rule-making activities.<sup>56</sup> And in the private sector, businesses now include mediation clauses in contracts with each other, with their customers, and with their employees, in case future disputes arise.<sup>57</sup>

The “institutionalization” of mediation, a term used to describe how public and private entities have adopted mediation as a standard and legitimate process for resolving disputes,<sup>58</sup> has historic origins in court reform. To appreciate the growth of mediation, especially its emergence as substance-specific procedure in state legislation, this Article must go back to the judicial reform movement in the last quarter of the twentieth century. The first section of this Part briefly explains the perceived shortcomings with judicial dispute resolution that reformers sought to repair with alternative dispute resolution (“ADR”). The second section then focuses specifically on mediation and the arguments that drove its institutionalization: improved efficiency and quality of justice.

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<sup>54</sup> See, e.g., Mark S. Umbreit, Robert B. Coates & Betty Vos, *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 279 (2004) (describing victim-offender mediation process as “interested victims of primarily property crimes and minor assaults . . . meet the juvenile or adult offender, in a safe and structured setting, with the goal of holding the offender directly accountable for his or her behavior”); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1248–49 (1994) (noting that victim-offender mediation (VOM) “transforms the criminal justice paradigm by placing victims at the center, rather than on the periphery, of the criminal process. In effect, VOM transfers the power to resolve all or part of a criminal case from the state to a private party—the victim.”).

<sup>55</sup> See, e.g., TEX. GOV’T CODE ANN. § 2260.052 (West 2008) (mandating rule-making agencies in state government to develop negotiation and mediation rules).

<sup>56</sup> This takes the form of negotiated rule-making or “neg-reg” (see, e.g., CAL. PUB. RES. CODE §§ 21168.5, 21168.6 (West 1995)). In 1990, the federal government passed the Negotiated Rulemaking Act, which permitted agencies to engage a third-party neutral to facilitate rule development, and the Administrative Dispute Resolution Act, which encouraged administrative agencies to use mediation for interagency or agency-public controversies. ALFINI ET AL., *supra* note 14, at 29–30.

<sup>57</sup> Stipanowich & Lamare, *supra* note 44, at 18–22.

<sup>58</sup> Some consider institutionalized mediation only as court-connected mediation requiring parties to mediate prior to a formal court hearing. E.g., Bobbi McAdoo, Nancy A. Welsh & Roselle L. Wissler, *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8, 8 (2003). Others expand the definition of institutionalized mediation to include mediation that takes place in, or is connected to, all public institutions including courts, administrative agencies, and public schools. E.g., Nancy A. Welsh & Peter T. Coleman, *Institutionalized Conflict Resolution: Have We Come to Expect Too Little?*, 18 NEGOT. J. 345, 346 (2002). This Article prefers the broadest conception of institutionalization, which is when any entity adopts mediation “as a part of doing business.” Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 904 (1997).

*A. Responding to Popular Dissatisfaction with the Courts*

The history of mediation's institutionalization begins with the modern<sup>59</sup> American judicial reform movement of the mid-1970s and early 1980s.<sup>60</sup> During this judicial reform period, jurists and legal scholars sought to improve delivery of just settlements and to rehabilitate the popular legitimacy of courts<sup>61</sup> through the use of alternative methods of dispute resolution.<sup>62</sup> The goals of the judicial reform movement were to employ new approaches to dispute processing, so-called "process pluralism," in order to relieve pressure on congested courts by reducing delay and eradicating unnecessary costs; involving communities in dispute

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<sup>59</sup> Earlier efforts to reform the American judicial system took place during the Progressive Era of the 1880s to 1920s. During this period, much like their successors in the 1970s, reformers argued that legal formalism was responsible for court congestion and procedural delays and looked to less formal processes like arbitration as a solution. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 397 (1906).

<sup>60</sup> Professor Frank Sander refers to this time of experimentation in forms of ADR as "Let a thousand flowers bloom," Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 3–4 (2000), perhaps alluding to Mao Zedong's "Hundred Flowers Campaign," a brief period of intellectual and artistic liberalization by China's Communist Party in 1956. JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 211–12 (1991). Some identify the beginning of the modern ADR movement with the 1976 "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," also called the Pound Conference. Warren E. Burger, Chief Justice of the U.S., *Agenda for 2000 A.D. – Need for Systematic Anticipation*, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976), in 15 JUDGES J. 27 (1976); *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Leo Levine & Russell R. Wheeler eds., 1979); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309 (1996).

<sup>61</sup> CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* 9–10 (1985). Some members of the judiciary thought the adversarial process had gone too far, causing erosion of important societal values like truth and justice. See, e.g., Dorothy W. Nelson, *Alternative Dispute Resolution: A Supermart for Law Reform*, 14 N.M. L. REV. 467, 468 (1984) (quoting Chief Justice Warren Burger as saying the use of adversarial processes as the primary means of resolving disputes is "a mistake that must be corrected . . . . For some disputes, trials will be the only means, but for many claims, trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.").

<sup>62</sup> Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 1 (1985) (explaining that the term "alternative dispute resolution mechanisms" refers to methods of dispute settlement that are "alternatives" to, not a replacement of, court adjudication).

settlement processes; enabling more people to access justice; and making dispute resolution more effective.<sup>63</sup>

Some judicial reformers advocated delegating formal judicial procedures and creating “multi-door courthouses”<sup>64</sup> and “community courts”<sup>65</sup> that could offer a range of dispute settlement processes and allow for better quality of justice depending on the nature of the dispute and the needs of the parties.<sup>66</sup> Others sought to capture disputes that never made it to the courts<sup>67</sup> and instead channel them to informal and nonadversarial community-based settings such as Neighborhood Justice Centers.<sup>68</sup> Both sets of reformers focused on mediation as an alternative method for dispute resolution,<sup>69</sup> the former group seeking to incorporate mediation

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<sup>63</sup> Seth Hufstедler & Paul Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965, 965–69 (1980); Sander, *supra* note 62, at 3. See generally Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WISC. L. REV. 893, 895–907 (1984) (providing an excellent contemporary discussion of, and literature review presenting, the different views on judicial reform).

<sup>64</sup> Frank E.A. Sander, *Varieties of Dispute Resolution, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (Apr. 7–9, 1976), in 70 F.R.D. 79 (1976), at 111.

<sup>65</sup> John C. Cratsley, *Community Courts: Offering Alternative Dispute Resolution Within the Judicial System*, 3 VT. L. REV. 1, 2–19 (1978).

<sup>66</sup> HARRINGTON, *supra* note 61, at 15.

<sup>67</sup> Researchers in the 1970s asked why so many individuals who suffered harm either never perceived their injury or never pursued remedies by bringing grievances to courts, a phenomenon they termed “grievance apathy” and identified as a complicating problem for access to justice reformers. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 L. & SOC’Y REV. 631, 633–37 (1980).

<sup>68</sup> HARRINGTON, *supra* note 61, at 29–31; Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEXAS L. REV. 1003, 1010–11 (2007); Raymond Shonholtz, *Justice from Another Perspective: The Ideology and Developmental History of the Community Boards Program*, in THE POSSIBILITY OF POPULAR JUSTICE, *supra* note 53, at 202. Critics, particularly from the political left, argued that Neighborhood Justice Centers were an extension of state power, not an exercise of popular justice at all. Richard L. Abel, *Expanding State Control*, in POLITICS OF INFORMAL JUSTICE, *supra* note 7 (arguing that informal justice merely disguises state coercion by removing traditional symbols of state prosecution—the male judge, the raised dais, the robes and security personnel); RICHARD HOFRICHTER, NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE 3 (1987).

<sup>69</sup> Although mediation proved popular among reformers of this period, other ADR processes like arbitration, early neutral evaluation, and summary jury trials were also promoted. Kovach, *supra* note 68, at 1007. Sociologist Roger Cotterell aptly characterizes efforts to make legal remedies more accessible to more people as “less concerned with increasing citizen access to existing legal institutions than with the possibility of changing legal institutions to bring them closer to citizens.” ROGER COTTERELL, THE SOCIOLOGY OF

into courts and the latter seeking to establish dispute settlement programs that, though external to courts, were complementary to the judicial system.<sup>70</sup>

### *B. Delivering Quality Resolution Faster*

Legislatures, courts, and administrative agencies incorporated mediation into public institutions at a time when reformers sought to make the state's dispute processing more accessible, efficient, effective, and just. Mediation's ability to provide an informal, consensus-based process, with a neutral third-party facilitator, made it popular among reformers. Those advocating for mediation to advance judicial reform goals relied on two primary arguments, often referred to in the literature as "the production argument" and "the quality argument."<sup>71</sup>

#### *1. The Production Argument*

The production argument posited that ADR processes like mediation would be less costly and more efficient than litigation. A perceived "explosion" of litigation was believed to clog courts and render "legal justice . . . costly, slow, and as a result, inaccessible."<sup>72</sup> Reformers theorized that by providing disputants with alternative avenues to settlement, like mediation, courts could help parties resolve disputes without lengthy discovery, litigation costs, and time spent attending court hearings.<sup>73</sup> And, presumably, since parties in mediation reached mutual agreement

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LAW: AN INTRODUCTION 291–92 (2d ed., 1992) (noting that the informalism movement, which sought to provide access to inexpensive "popular justice," also coincided with the distinct delegalization movement, which emphasized mediation and negotiation in dispute processing rather than relying on formal rules and procedures).

<sup>70</sup> Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1, 7–9 (1973). See also Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 705–09 (2008) (providing an insightful discussion of the relationship between mediation and the courts since the 1960s).

<sup>71</sup> Marc Galanter, " . . . A Settlement Judge, not a Trial Judge:" *Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1, 8 (1985).

<sup>72</sup> Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 321–22 (1985). It is important to note that scholars like Austin Sarat and Marc Galanter questioned the assumption that American society had become so unreasonably litigious as to cause a "litigation explosion" requiring court reform. They instead suggested that the volume of court cases served as a measure of judicial involvement in society's dispute resolution. *Id.* at 329; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 10–11 (1983).

<sup>73</sup> See, e.g., Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q. 15, 20–21 (1990) (describing a study of Northern California divorce cases for which the average cost of adjudication for a



on how to settle the dispute, they would be more likely to comply with the terms of their agreement, thus reducing costs associated with enforcement claims or appeals. Some contemporary evaluations of mediation programs supported the efficiency assertions made by judicial reformers. For example, a 1977 study of mediated and nonmediated small claims cases in six district courts in Maine found that within six to eight weeks following resolution, 72.8% of mediated outcomes resulted in full compliance and 10.5% in noncompliance, whereas only 35% of adjudicated outcomes resulted in full compliance and almost half in noncompliance.<sup>74</sup> Furthermore, reformers believed that, with more cases resolved in mediation, the administrative and personnel costs for courts, and assumedly the burden on taxpayers, would also likely be reduced. A 1981 study of contested child-custody cases in Denver found reductions in public sector costs (between \$5,610 and \$27,510 per 100 cases) by processing cases with mediation instead of an adversarial process.<sup>75</sup>

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divorcing couple was higher (\$12,226) than the cost of a “comprehensive” mediation that included attorney consultation (\$5,234)); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 265, 267–69 (1985) (“Justice is becoming ever more inaccessible to the poor and middle class; the disparity of resources between parties in a case is often determinative of its outcome.”). See also Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE, *supra* note 60, at 66–68, 72–79; Sander, *supra* note 62, at 3; Luban, *supra* note 14, at 401.

<sup>74</sup> Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC’Y REV. 11, 16, 21 (1984). Cf. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 470–71 (1985) (citing contradictory results in two studies of divorcing couples who resolved their disputes either through mediation or the adversarial system, noting that “while mediation may not always be more effective than adjudication in preventing relitigation, it certainly does not produce a rash of such activity”).

<sup>75</sup> Jessica Pearson & Nancy Thoennes, *The Benefits Outweigh the Costs*, FAM. ADVOC., Winter 1982, at 28. Cost savings to the public have also been supported by some more recent assessments. JUD. COUNCIL OF CAL., ADMIN. OFF. OF THE CTS., EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS xxi–xxii (2004), <http://www.courts.ca.gov/documents/empprept.pdf> [<https://perma.cc/CM8T-TBA5>] (discussing a 2004 survey of California early-mediation programs that found programs reduced the courts’ workload by dropping demand for judges’ time for hearing motions and other pretrial court events; and the total potential savings ranged from \$1.4 million/year (San Diego), to \$400,000/year (Los Angeles), and \$9,700 (Sonoma), with savings in other jurisdictions offset by increases in case management conferences); TERESA G. CAMPBELL & SHARON L. PIZZUTI, COURTLAND CONSULTING, THE EFFECTIVENESS OF CASE EVALUATION AND MEDIATION IN MICHIGAN CIRCUIT COURTS 29–31 (2011) (discussing a study of both mediation and early case evaluation for civil cases in Michigan that showed that mediation generally reduces costs to the court (saving expense associated with trials, but still proving time-consuming for court staff to manage) and that mediation, while initially a more expensive option for litigants, ultimately reduced overall costs).

Mediation could aid the reform goal of efficiency by providing a helpful structure for settlement negotiations.<sup>76</sup> In contrast to direct party negotiations that occur in fits and starts, the mediation process injects a sense of decorum by creating a meeting time and place for the parties to sit down together,<sup>77</sup> often sharing the same meeting space and table.<sup>78</sup> Mediation advocates observed that, with the structure mediation imposes on negotiations, negotiations can become less adversarial, false assumptions can be corrected, and unreasonable demands (from clients and opposing parties) can be checked by mediators asking questions and clarifying meaning.<sup>79</sup> Mediation could thus overcome informational barriers by enabling direct, confidential communication among parties and their lawyers.<sup>80</sup>

## 2. *The Quality Argument*

The second argument made for institutionalizing mediation, the “quality argument,” reasoned that mediation yielded better outcomes than litigation by empowering parties in the process. Mediation, as a consensual process, could give parties control over how their conflicts would be resolved. Putting parties in a position to develop their own resolution could yield customized outcomes that responded to their specific needs. Indeed, parties in mediation might develop

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<sup>76</sup> Indeed, mediation is often called “assisted” negotiation. *See, e.g.*, Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 71 (2002). Because most disputes are resolved not by judge- or jury-rendered decisions, but instead through settlement negotiations, many thought that improving out-of-court negotiations would also reduce reliance on courts. Thus, on the one hand, advocates for reform perceived mediation’s value, relative to adjudication, as its informal and less-structured procedure while, on the other hand, they saw mediation’s value relative to direct party negotiations as the imposition of formality and structure. Robert A. Baruch Bush, “What Do We Need a Mediator For?”: *Mediation’s “Value-Added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 5–6 (1996). *Cf.* Luban, *supra* note 14, at 396 (affirming that the mere presence of a neutral party who has the power, even if never exercised, to influence negotiation puts ADR into an entirely different system than unmediated negotiation).

<sup>77</sup> Craig A. McEwan, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1369–70 (1995). It is important not to overlook the mundane—a scheduled mediation creates a time and a place for negotiation, which has the potential to help busy attorneys focus and prepare more thoroughly than ad hoc conversations with the other side. *Id.* at 1387.

<sup>78</sup> This is not always the case. In some forms of mediation—for example, in high-conflict family cases—the mediator never brings the disputing parties together and instead relies on shuttle diplomacy to facilitate negotiations.

<sup>79</sup> McEwan et al., *supra* note 77, at 1367–68, 1370–71, 1379.

<sup>80</sup> Bush, *supra* note 76, at 12–15.

creative remedies that courts did not have the power to provide.<sup>81</sup> Engaging and including parties in the exercise of crafting their own resolution had important procedural justice implications<sup>82</sup>—it could help parties feel more empowered and lead to heightened morale.<sup>83</sup> Mediation advocates argued that establishing trust and communication would positively transform the parties' relationship and prevent future conflict.<sup>84</sup> Indeed, when aggregated, the positive effects of mediation could improve civil discourse<sup>85</sup> and society as a whole.<sup>86</sup>

Although the arguments that mediation could alleviate pressure on court dockets, reduce costs, and also yield more satisfying resolution of disputes proved persuasive,<sup>87</sup> the institutionalization of mediation did not move forward without

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<sup>81</sup> Menkel-Meadow, *supra* note 37, at 7 (“[T]he ‘limited remedial imagination’ of courts in providing outcomes restricts what possible solutions the parties could develop.”); *see also* Main, *supra* note 37.

<sup>82</sup> E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 101–06 (1988) (proposing that individuals find processes fairer when given an opportunity to speak and tell their story); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 172 (2002) (arguing that fairness, from a disputant's perspective, is closely connected to meaningful opportunities to tell one's story and have that story be received with dignity and in an even-handed manner).

<sup>83</sup> A special workshop, “Identifying and Measuring the Quality of Dispute Resolution Processes and Outcomes,” hosted by the University of Wisconsin's Dispute Processing Research Program in 1987, yielded insightful papers including Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 351 n.33 (1989) (connecting arguments of ADR practitioners and advocates to the six general definitions of “quality in dispute resolution processes or outcomes” developed out of the workshop).

<sup>84</sup> *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 41–84 (2005) (describing the way in which mediation interrupts the negative conflict spiral of disempowerment and demonization).

<sup>85</sup> *See, e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. FOR STUDY LEGAL ETHICS 49, 69–72 (1996); Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution: Two Theories and Practices of Participation in the Polity*, 12 DISP. RESOL. MAG. 18, 18 (2005).

<sup>86</sup> Ackerman, *supra* note 76, at 31, 51, 71–75 (explaining that consensus-based processes build community because they are participant driven).

<sup>87</sup> Interestingly, perhaps with the exception of the studies cited earlier, the production argument has not borne out over time, but the quality argument has. *See* Donna Shetowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 560–62, 560 n.37, 563–66 (2008) (“[E]mpirical evidence to-date offers little support for the idea that ADR reduces docket overload or promotes court efficiency.”); *see also id.* at 563 (“Research has rather consistently shown that ADR subjectively appeals to ordinary citizens. They regard ADR procedures as fair and value them for providing an opportunity

plenty of skepticism. Many voices challenged the premise that ADR could improve access to justice for societies' marginalized groups, such as communities of color, women, and the socioeconomically disadvantaged.<sup>88</sup>

Nevertheless, across the country, during the 1980s and 1990s, state<sup>89</sup> and federal<sup>90</sup> courts and administrative agencies built mediation programs, either under their own initiative or at the behest of legislatures. Consider, for example, Oklahoma's Dispute Resolution Act of 1983, the purpose of which was to "provide . . . convenient access to dispute resolution proceedings which are fair, effective, inexpensive, and expeditious."<sup>91</sup> With this law, the Oklahoma legislature authorized "[a]ny county, municipality, accredited law school or agency of this state" to establish mediation programs and tasked the Administrative Director of the Courts to administer the programs and "promulgate rules and regulations."<sup>92</sup> Today, most public institutions employ their own mediators,<sup>93</sup> contract with private

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for voice and process control which promote self-determination."); Wissler, *supra* note 47, at 660–73.

<sup>88</sup> See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359 ("[T]o protect minorities, ADR should be reserved for disputes in which parties of comparable status and power confront each other."); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 57–61 (1984); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1547–51 (1991); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 441–46 (1992); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058–66 (1996).

<sup>89</sup> For a discussion of how states establish statewide mediation programs, see Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1029–35 (1992). Although Professor Press wrote this article when the institutionalization of mediation in courts and administrative agencies was gaining momentum, her analysis and considerations remain relevant decades later.

<sup>90</sup> At the federal level, the U.S. Congress passed the Alternative Dispute Resolution Act in 1998 (codified as 28 U.S.C. § 651), authorizing all federal courts to develop ADR programs and the Administrative Dispute Resolution Act in 1990 (codified as 5 U.S.C. § 571), which requires each federal administrative agency to adopt a policy addressing the use of ADR and to promote the use of ADR whenever appropriate.

<sup>91</sup> OKLA. STAT. ANN. tit. 12, § 1801 (2015) ("The Legislature is aware of the fact that many disputes arise between citizens of this state which are of small social or economic magnitude and can be both costly and time consuming if resolved through a formal judicial proceeding. Many times such disputes can be resolved in a fair and equitable manner through less formal proceedings. Such proceedings can also help alleviate the backlog of cases which burden the judicial system in this state. It is therefore the purpose of this act to provide to all citizens of this state convenient access to dispute resolution proceedings which are fair, effective, inexpensive, and expeditious.").

<sup>92</sup> OKLA. STAT. ANN. tit. 12, § 1803(A) (2015). For an example of such rules and regulations, see KENTUCKY'S MODEL MEDIATION RULES (2012), [http://courts.ky.gov/court\\_programs/mediation/Pages/modelmediation.aspx](http://courts.ky.gov/court_programs/mediation/Pages/modelmediation.aspx) [<https://perma.cc/HA47-NRHA>].

<sup>93</sup> See, e.g., U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, <http://www.ca9.us>

mediators for mediation services,<sup>94</sup> or refer disputing parties to a freestanding mediation center.<sup>95</sup> Across the country, almost all parties that turn to state institutions to resolve civil disputes are required to participate in some form of ADR and demonstrate their efforts to settle the dispute before a judge or agency decision maker will hear the case.<sup>96</sup>

#### IV. LEGISLATURES EXPAND BREADTH AND DEPTH OF THEIR MEDIATION MANDATES

In recent years, particularly since the early 2000s, legislatures have increasingly deployed mediation as a means to regulate private parties' dispute resolution. This phenomenon is a distinct departure from legislatures' previous role in institutionalizing mediation. In earlier phases of mediation's institutionalization, legislatures enacted statutes authorizing courts and administrative agencies to develop mediation programs, as the Oklahoma example above illustrates. Now, legislatures also embed mandatory mediation clauses directly into substantive law.<sup>97</sup> Parties must mediate in order to assert or defend rights under statutes governing, for example, certain kinds of commercial contracts, insurance coverage, property transactions, and employment.<sup>98</sup>

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courts.gov/mediation/view.php?pk\_id=0000000676 [https://perma.cc/BL59-VCNK] (showing the Ninth Circuit has its own mediators who all work exclusively for the Court of Appeals).

<sup>94</sup> Wissler, *supra* note 47, at 654; *see, e.g.*, 5-1-2 VT. CODE R. § 2, rules promulgated pursuant to VT. STAT. ANN. tit. 10, § 6252 (2015) (Vermont's Department of Housing and Community Development, which maintains a roster of mediators for rental disputes).

<sup>95</sup> Press, *supra* note 89, at 1041-48; *see, e.g.*, Administrative Order No. 09-08 (Fla. 11th Jud. Cir. Apr. 9, 2009), [http://www.jud11.flcourts.org/documents/Administrative\\_Orders/1-09-08-Establishment%20of%20HOME%20Mediation%20Program.pdf](http://www.jud11.flcourts.org/documents/Administrative_Orders/1-09-08-Establishment%20of%20HOME%20Mediation%20Program.pdf) [https://perma.cc/F2PW-HY7T].

<sup>96</sup> COLE ET AL., *supra* note 1.

<sup>97</sup> This form of embedded procedure or substantive law with tailored procedure is different from the much discussed and debated issue of substance-specific procedure, by which certain federal rules of civil procedure are modified for particular kinds of claims. Not only are these statutes appearing at the state, not federal, level, but also the mandate to mediate appears directly in substantive statutory regimes. For more discussion and background into the debate around transsubstantive procedure versus substance-specific procedure, *see* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 27-29 (1994); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's Tolstoy Problem*, 46 FLA. L. REV. 57, 58-60 (1994); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 377-78 (2010).

<sup>98</sup> Some statutory mediation mandates appear to do more than push parties to discuss settlement and in fact work to advance substantive policy objectives. For example, in the

Legislatures use mediation to regulate disputing parties in two different ways. First, they build mandatory mediation requirements into specific statutes to manage private citizens' disputes directly, even before they turn to the government for assistance.<sup>99</sup> Second, not only do legislatures mandate that parties mediate specific disputes, but they also instruct parties on *how* to mediate. Rather than leaving the mediation process unspecified or, in the alternative, delegating to courts and administrative agencies the task of developing rules for mediation, legislatures themselves design mediation procedure by building additional legal requirements into statutes. Through these mediation statutes, the legislature extends the breadth and depth of its control over private-party dispute processing.

This Part explores both categories of statutory regulation. Section A presents statutes that embed mediation as mandatory dispute resolution procedure. These statutes impose a legal obligation to mediate on parties with certain kinds of disputes. Section B demonstrates that many statutory mandates to mediate go beyond requiring parties to try settling their disputes in mediation. Some legislatures, when constructing statutory mediation requirements, tack on additional legal obligations that control parties' settlement negotiations and shape the outcome of the mediation process. Not only do these laws directly regulate parties' behavior in mediation, but they can also influence the parties' relationship by creating leverage and incentivizing settlement. These requirements transform mediation from its classical conception as an informal, delegalized, outcome-neutral process—what made mediation so popular during the judicial reform movement—into a highly structured, formal process, with rules and procedures spelled out in statute.

### A. Mandating Mediation for Specific Disputes

States create legal obligations for private parties to mediate in a variety of contexts, including disputes relating to commercial contracts, insurance coverage, property rights, employment, and health.<sup>100</sup> Many of these statutory mediation

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foreclosure context, mediation statutes were passed with the intent to stop foreclosures, to save homeowners, and buoy the local housing market. *See, e.g.*, H.R. 58, 146th Gen. Assemb., Reg. Sess. (Del. 2011) (discussing the policy statement in Delaware House Bill 58, Courts and Judicial Procedures—Foreclosure—Mediation). Lawmakers' decision to deploy mediation for substantive public policy purposes is beyond the scope of this particular Article, but a topic I have explored elsewhere. Lydia Nussbaum, *ADR's Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1891, 1908 (2013).

<sup>99</sup> COLE ET AL., *supra* note 1.

<sup>100</sup> This Article focuses on statutes that mandate one or both parties to use mediation (using the search term “shall mediate”), particularly those that relate directly to private disputing parties in civil matters, although some statutes mandate mediation between private and public entities (e.g., Pennsylvania's tax collection statute (53 PA. STAT. AND CONS. STAT. ANN. § 6924.505 (2015))). Statutes that are not substance-specific are

requirements appear to have developed organically, in an ad hoc fashion, perhaps to respond to concerns about local industry practices, advocacy for consumer protection, or a desire to alleviate civil court dockets.

One common area in which states deploy these statutory mediation mandates involves disputes between private commercial contracting parties, often relating to manufacturing and distribution contracts. For example, agricultural cooperatives in Maine and the handlers of their agricultural products,<sup>101</sup> or electricity cooperatives in Texas and the cable operators who erect electric utility poles, all have a statutory requirement to mediate disputes.<sup>102</sup> Florida, Texas, Virginia, and Wisconsin require mediation for disputes involving motor vehicle manufacturers and franchise car dealers.<sup>103</sup> Maryland regulates private contracts between beer manufacturers and beer distributors. It requires mediation if a new entity takes over the manufacturing and wants to replace the old distributor with a new distributor, but the two distributors, old and new, cannot agree on a buyout amount for the distribution contract.<sup>104</sup> Illinois requires telecommunications carriers to mediate with consumers upon request;<sup>105</sup> similarly, Michigan requires informal alternative dispute resolution, including mediation, for complaints valued under \$1,000 brought against telecommunication carriers.<sup>106</sup> In almost all of these contract disputes, the mediation mandate attaches directly to the parties, without the requirement of filing a claim with a court or administrative agency.

Many states also impose legal obligations to mediate absent state institutional intervention in the insurance context. For example, claims involving condominium insurance in Washington,<sup>107</sup> hazardous waste liability insurance in Oregon,<sup>108</sup> and fire, earthquake and automobile insurance in California,<sup>109</sup> are all subject to statutory mediation requirements. Similarly, in Texas, disputes over

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excluded (e.g., statutes generally regulating mediators' qualifications and experience, the effect of mediation on tolling of statutes of limitations, confidentiality and privileged mediation communications, as well as how mediation programs should be administered).

<sup>101</sup> ME. REV. STAT. ANN. tit. 13, § 1958-B (2015).

<sup>102</sup> TEX. UTIL. CODE ANN. § 252.005 (West 2015).

<sup>103</sup> FLA. STAT. ANN. § 320.3210 (2015); TEX. OCC. CODE ANN. § 2301.522 (West 2015); VA. CODE ANN. § 46.2-1572.2 (West 2015); WIS. STAT. ANN. § 218.0136 (West 2015). Virginia, unlike Texas, mandates mediation only when one of the parties requests mediation.

<sup>104</sup> MD. CODE ANN. art. 2B, § 21-103 (2015). These mediations might be more aptly called "beer summits."

<sup>105</sup> 220 ILL. COMP. STAT. ANN. 5/13-713 (West 2013).

<sup>106</sup> MICH. COMP. LAWS ANN. § 484.2203a (West 2008).

<sup>107</sup> WASH. REV. CODE ANN. § 64.35.605 (West 2007) (requiring mediation of condominium insurance claims if the claimant (condominium unit owner or homeowners' association) and the insurer have not been able to resolve the claim and one of the parties requests mediation).

<sup>108</sup> OR. REV. STAT. ANN. § 465.484 (West 2013).

<sup>109</sup> CAL. INS. CODE § 10089.70 (West 2013) (making mediation mandatory only if one of the parties requests it).

reimbursement of out-of-network health insurance claims must also be mediated.<sup>110</sup>

In addition to mandating mediation for conflicts between parties to a commercial or insurance contract, state legislatures also mandate that private parties mediate various disputes involving property rights. Legislatures in a number of nonjudicial foreclosure states<sup>111</sup>—for example, Hawaii,<sup>112</sup> Washington,<sup>113</sup> and Nevada<sup>114</sup>—require mediation between eligible homeowners and mortgage lender representatives before the property can be sold at auction.<sup>115</sup> Multiple states require any construction defect issues to be mediated before a suit can be filed.<sup>116</sup> In Hawaii, if a party to a dispute involving a condominium<sup>117</sup> or planned community association<sup>118</sup> requests mediation, the other party is legally obligated to participate. Gun shooting range operators in Vermont must mediate with neighboring property owners,<sup>119</sup> and private solid waste facility licensees in Maine must use mediation if they cannot establish an agreement with their host community.<sup>120</sup> Furthermore, real estate brokers in Colorado have a legal obligation to mediate with property owners in the event they dispute the commission for leasing commercial real estate.<sup>121</sup> Legislators in Vermont and Washington enacted a law requiring landlords and tenants in mobile home parks to mediate eviction disputes. The landlord's failure to participate in good faith is a legal defense to eviction.<sup>122</sup> California and Oregon also mandate mediation of disputes between archeologists and American Indian tribes regarding repatriation of disinterred

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<sup>110</sup> TEX. INS. CODE ANN. § 1467.056 (West 2012). An interesting thing to note is that parties may already be negotiating over insurance claims even without this statutory requirement to mediate. In which case, these mandates to mediate pull private discussions into the public sphere by laying down rules by which the negotiations should occur.

<sup>111</sup> Nonjudicial foreclosure allows lender representatives to initiate foreclosure privately, without obtaining an order of the court, as long as they comply with notice requirements.

<sup>112</sup> HAW. REV. STAT. ANN. § 667-71 (LexisNexis 2012); *see id.* § 667-74.

<sup>113</sup> WASH. REV. CODE ANN. § 61.24.030 (West 2007).

<sup>114</sup> NEV. REV. STAT. ANN. § 107.086 (LexisNexis 2007).

<sup>115</sup> Nussbaum, *supra* note 98, at 1919–1944.

<sup>116</sup> WASH. REV. CODE ANN. § 64.55.120 (West 2007); CAL. CIV. CODE § 910 (West 2007); *id.* § 919 (imposing a legal obligation on the contractor to include an offer to mediate with the offer to repair); HAW. REV. STAT. § 672E-1; *see* HAW. REV. STAT. § 672E-7; NEV. REV. STAT. ANN. § 40.680 (LexisNexis 2012).

<sup>117</sup> HAW. REV. STAT. ANN. § 514B-161 (West 2016).

<sup>118</sup> HAW. REV. STAT. ANN. § 421J-13 (LexisNexis 2008); *see also* NEV. REV. STAT. ANN. § 38.330 (LexisNexis 2013) (requiring mediation whether a party has requested it or not).

<sup>119</sup> VT. STAT. ANN. tit. 10, § 5227a (2011).

<sup>120</sup> ME. REV. STAT. ANN. tit. 38, § 1310-N (West 2014).

<sup>121</sup> COLO. REV. STAT. § 38-22.5-101 (2015).

<sup>122</sup> VT. STAT. ANN. tit. 10, § 6252; WASH. REV. CODE ANN. § 59.20.080 (West 2015).



human skeletal remains or burial goods.<sup>123</sup> Although the circumstances of these property-related disputes differ, each is governed by a statutory regime that legally requires affected parties to try resolving their disagreements in mediation before engaging state institutions for help.

Statutory mandates to mediate without or before institutional intervention also appear in health-related disputes. For example, several state statutes require mediation of all causes of action for injuries arising from healthcare services.<sup>124</sup> In New York, physicians at mental health facilities who believe a “do not resuscitate” order is no longer appropriate, but the individual who originally granted consent for the order refuses to revoke it, must submit the dispute to mediation or transfer the patient to another physician.<sup>125</sup> In Florida, nursing home residents or their survivors who allege rights violations or negligence by the nursing home facility must complete a strict pre-suit process, laid out in detail by statute, which includes mandatory mediation.<sup>126</sup> Individuals with complaints against adult family-care homes in Florida must also mediate if they want to recover attorney fees.<sup>127</sup> As in the case of commercial, insurance, or property disputes, each particular statutory mediation scheme is specific to certain types of health disputes.

Finally, there are mediation requirements relating to employment. In Colorado, for example, the state legislature passed the “Workplace Accommodations for Nursing Mothers Act,” which grants nursing mothers a legal right to pump or breast feed at the workplace and requires employers to make reasonable efforts to accommodate this right.<sup>128</sup> Should a working mother believe her employer is violating her rights under the law, she must first mediate with her employer before initiating formal litigation.<sup>129</sup>

These examples are by no means an exhaustive list. They serve to illustrate how legislatures impose mediation mandates directly on parties, rather than delegating that decision to courts and public agencies, as a means of encouraging resolution of a wide range of private disputes.

### *B. Controlling and Incentivizing Mediation Behavior*

As legislators increasingly embed mediation mandates into substantive statutes, many also specify in statute how the disputants shall utilize or behave in the mediation. Statutes regulate parties in mediation by 1) controlling who can and

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<sup>123</sup> CAL. HEALTH & SAFETY CODE § 8012 (West 2007) (describing dispute settlement process via mediation at *id.* § 8016(c)–(j)); OR. REV. STAT. § 390.240(1)(b) (2013).

<sup>124</sup> S.C. CODE ANN. § 15-79-125 (2015); WASH. REV. CODE ANN. § 7.70.100 (West 2015) (stating that health care provider includes everyone from East Asian medicine practitioners to midwives, opticians, and paramedics).

<sup>125</sup> N.Y. PUB. HEALTH LAW § 2960 (McKinney 2012).

<sup>126</sup> FLA. STAT. ANN. § 400.0233 (West 2012).

<sup>127</sup> FLA. STAT. ANN. § 429.87 (West 2013).

<sup>128</sup> COLO. REV. STAT. ANN. § 8-13.5-101 (West 2015).

<sup>129</sup> COLO. REV. STAT. § 8-13.5-104(5) (2012).

cannot participate; 2) mandating information exchange; 3) requiring parties to take negotiations seriously; 4) prescribing topics for discussion; 5) making mediation a condition precedent to a formal proceeding; and 6) incentivizing settlement.<sup>130</sup> This type of regulation, whether purposeful or inadvertent, transforms mediation into a highly formalized, choreographed process with built-in procedural rules, rights, and restrictions.

### *1. Who Participates in Mediation*

Some statutes dictate who shall and who shall not participate in the mandatory mediation. In situations where one of the parties is an organization or business entity, policymakers will require an individual with settlement authority either to be physically present or participate by phone during the mediation.<sup>131</sup> If it is unclear which parties are essential for resolving the dispute, some states deputize the mediator with the power to determine which parties are necessary for “effective” mediation.<sup>132</sup> One purpose for requiring someone with settlement authority to participate in the mediation is to ensure that agreements reached in mediation are final and can indeed entirely conclude the matter in dispute.

Statutes may also prohibit certain individuals, like legal counsel, from participating. For example, the state of California instructs mediators in insurance disputes to determine whether the insured party will be represented by legal counsel at the mediation and, if not, prohibits any legal counsel from being present in the mediation.<sup>133</sup> One hypothesis for this policy is that legislatures may be trying to level the ground between the parties and avoid a “repeat player” phenomenon or situations in which one party has inherent bargaining advantage due to familiarity with the mediation process or greater legal sophistication.<sup>134</sup>

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<sup>130</sup> Some statutes have only one of these characteristics, while others have them all. For example, Nevada’s nonjudicial foreclosure mediation statute prescribes how and when parties shall mediate. NEV. REV. STAT. ANN. § 107.086 (LexisNexis 2011).

<sup>131</sup> See 53 PA. STAT. AND CONS. STAT. ANN. § 6924.505(k)(2)(iii) (West 2008) (mandating mediation for tax-collection disputes and requiring parties in attendance at mediation to have official authorization to settle the matter).

<sup>132</sup> E.g., ME. REV. STAT. ANN. tit. 14, § 6321-A (2014) (stating that a “mediator shall include in the mediation process . . . any person the mediator determines is necessary for effective mediation”).

<sup>133</sup> CAL. INS. CODE § 10089.80(b) (West 2013) (“The mediator shall determine prior to the mediation conference whether the insured will be represented by counsel at the mediation. The mediator shall inform the insurer whether the insured will be represented by counsel at the mediation conference. If the insured is represented by counsel at the mediation conference, the insurer’s counsel may be present. If the insured is not represented by counsel at the mediation conference, then no counsel may be present.”).

<sup>134</sup> While this “repeat player” terminology was originally used by Professor Galanter in reference to parties in litigation, presumably the same phenomenon could exist in the mediation context as well. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–101 (1974)

## 2. *Information Exchange*

State statutes can also mandate that information be exchanged prior to or during the mediation session. Rather than leaving parties to exercise discretion about what information is disclosed in negotiations, legislatures require certain disclosures. Just as parties must comply with discovery rules when litigating, requirements to exchange information and documentation can function as “pre-mediation discovery”<sup>135</sup> to facilitate informed negotiations. For example, in the family law context, parents with a child-support dispute may be statutorily required to exchange affidavits and documentation showing most recent income and assets, as well as completed child support worksheets, before attending mandatory mediation.<sup>136</sup> Such information exchange enables parties to negotiate in mediation with the most current information, ensuring that agreements reached are informed by events on the ground, not what may have been the case months earlier. In some instances, statutes require both parties to exchange not just documents, but to obtain outside information. For example, in addition to exchanging documentation, the law may further require meeting with experts prior to mediation in order to determine the validity of certain claims or to narrow down what the actual negotiable issues will be during the mediation session.<sup>137</sup>

Some statutes may obligate only one of the parties to furnish information. A complainant might have to provide the other party with notice of the harm alleged and relief sought so that the responding party can conduct its own investigations in advance of mediation.<sup>138</sup> Requiring a party to provide particular notice of alleged

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(noting that litigants who utilize the courts frequently, so-called “repeat players,” as opposed to “one-shotters,” or claimants who rely on courts only occasionally, have inherent advantages: having litigated before, they have preexisting systems for court transactions; they can develop expertise and access specialists easily; they can establish informal relationships with institutional actors; they are more willing to fight for precedent to achieve more gains over the long term).

<sup>135</sup> NEV. REV. STAT. ANN. § 40.681 (West 2012).

<sup>136</sup> See ME. REV. STAT. tit. 19-A, § 2004 (“The plaintiff and defendant shall exchange, prior to mediation, affidavits regarding income and assets. These affidavits must conform with the forms provided by the court and must be accompanied by supporting documentation of current income, such as pay stubs, tax returns, employer statements or, if the plaintiff or defendant is self-employed, receipts and expenses . . . . The parties shall exchange prior to the commencement of mediation a completed child support worksheet. The worksheet must be completed in accordance with the support guidelines.”).

<sup>137</sup> See WASH. REV. CODE ANN. § 64.55.120(2) (West 2007) (mandating mediation for construction defects in multi-unit residential buildings and requiring that “[p]rior to the mediation required by this section, the parties and their experts shall meet and confer in good faith to attempt to resolve or narrow the scope of the disputed issues, including issues related to the parties’ repair plans”).

<sup>138</sup> See FLA. STAT. ANN. § 400.0233(2) (West 2012) (mandating mediation of disputes alleging negligence or violation of resident rights by a nursing home and requiring “[p]rior

harm and relief sought might help clarify issues in dispute or ensure that claims lacking legal merit are excluded.<sup>139</sup> These requirements are analogous to rules of civil procedure requiring pleadings to include a claim for relief.<sup>140</sup> In contrast, the burden for generating documentation to demonstrate reasonableness of an alleged harm also can fall on the responding party. A Vermont law mandating mediation of disputes over rent increases at mobile home parks requires the park owner to provide documents and relevant information supporting the proposed rent increase, giving the park owner “the burden” of showing that the increase is reasonable.<sup>141</sup> Collectively, statutory mediation mandates that compel information exchange push parties to obtain factual support for their positions, an activity that might not otherwise occur naturally or in the absence of judicial or administrative intervention.

### 3. *Good-Faith Negotiations*

When legislators require parties to negotiate in mediation, they often use statutes to ensure that the disputing parties take seriously the opportunity to negotiate. Often this takes the form of good-faith requirements or sometimes, consequences for mediating in bad faith, both of which are controversial practices also used by courts to motivate parties to make a sincere effort to resolve their disputes.<sup>142</sup> To compel fair or cooperative behavior in mediation, which occurs

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to filing a claim . . . a claimant . . . shall notify each prospective defendant by certified mail . . . of an asserted violation of a resident’s rights . . . or deviation from the standard of care. Such notification shall include an identification of the rights . . . violated and the negligence alleged . . . and a brief description of the injuries sustained by the resident which are reasonably identifiable at the time of notice.”).

<sup>139</sup> FLA. STAT. ANN. § 400.0233(2) (West 2012) (“The notice shall contain a certificate of counsel that counsel’s reasonable investigation gave rise to a good faith belief that grounds exist for an action against each prospective defendant.”).

<sup>140</sup> FED. R. CIV. P. 8.

<sup>141</sup> VT. STAT. ANN. tit. 10, § 6252(b) (2011) (“No later than five days before the initial mediation session, the mobile home park owner shall provide to the mediator and the leaseholders’ representative all documents and information that the park owner considers relevant to support the proposed lot rent increase. The mobile home park owner shall have the burden of providing information to show that proposed lot rent increase is reasonable.”). *See infra* notes 241–243 and accompanying text (discussing prescribed topics for mediation that have a similar effect of creating transparency between the parties).

<sup>142</sup> Requirements for good-faith participation in mediation are hotly debated. Proponents of a good-faith requirement argue that it provides general guidelines for good conduct, a cause of action for parties on the receiving end of bad behavior, and, if courts are willing to serve up sanctions against good-faith violators, cooperation from otherwise uncooperative parties. The good-faith requirement can be broadly construed as a totality of circumstances surrounding party conduct, *see* Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 627 (2001) (distinguishing

behind closed doors and out of the public eye, legislators legally obligate parties to fair dealing. Statutes may either include general good-faith requirements<sup>143</sup> or lay out specific criteria constituting bad faith, such as failure to attend mediation sessions without cause, failure to provide full information, or participant failure to have settlement authority in mediation.<sup>144</sup>

Of course, even when legislation compels meaningful participation in the mediation, policing behavior still poses a challenge. Some states address this issue by requiring the mediator to report lapses in good faith observed during mediated negotiations.<sup>145</sup> Others empower the well-behaved party with a new cause of action: failure to mediate in good faith.<sup>146</sup> Legislators also use this downstream approach by assigning courts the task of ascertaining whether parties appearing in

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bad faith from hard bargaining), or as specific, demonstrable conduct such as attending mediation with settlement authority, following the mediator's rules, and engaging in meaningful and direct negotiation discussions. Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 622–23 (1997). Opponents argue that good-faith requirements violate mediation confidentiality and give mediators too much power because the only way to demonstrate lack of good faith for purposes of obtaining judicial sanctions is from mediator reporting or testimony. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 102–08 (2002). A further concern is that parties will threaten each other with bad-faith claims as a strategy for gaining leverage in negotiations. John Lande, *Why a Good-Faith Requirement Is a Bad Idea for Mediation*, 23 ALTERNATIVES HIGH COST LITIG. 1, 9 (2005).

<sup>143</sup> See, e.g., ME. REV. STAT. ANN. tit. 13, § 1958-B (2005) (“Regardless whether mediation is sought mutually or unilaterally, both parties shall participate in mediation in good faith.”).

<sup>144</sup> See, e.g., MINN. STAT. ANN. § 583.27(1)(a) (West 2010) (obligating good-faith participation from parties in farm creditor mediation); TEX. INS. CODE ANN. § 1467.101(a) (West 2009) (enumerating behavior constituting bad faith in health insurance mediation). Both the Texas and Minnesota statutes make sure to clarify, however, that a failure to agree does not evidence proof of bad faith. TEX. INS. CODE ANN. § 1467.101(b); MINN. STAT. ANN. § 583.27(1)(a).

<sup>145</sup> See, e.g., VT. STAT. ANN. tit. 12, § 4634(a), (b)(5) (2015) (requiring the mediator in a foreclosure action to file a written report outlining the results of the mediation process and, among other things, identifying whether any party failed to attend the mediation, participate in good faith, or provide statutorily mandated information); MINN. STAT. ANN. § 583.27(2) (West 2010) (requiring mediator to file an affidavit with parties and with mediation program director).

<sup>146</sup> See, e.g., *Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1283 (Nev. 2011) (holding that the foreclosing party should be sanctioned for failure to bring a required document to mediation and have a person with settlement authority present at mediation, both of which were duties required by state statute and supreme court rules); *Leyva v. Nat’l Default Servicing Corp.*, 255 P.3d 1275, 1281 (Nev. 2011) (holding that loan servicer representative’s failure to bring to mediation required documents showing assignment of the deed of trust and mortgage note qualified as bad faith under Nevada’s Foreclosure Mediation Rules and was a “sanctionable” offense).

a formal hearing made a good-faith effort to settle in mediation.<sup>147</sup> Statutes can empower judges with a variety of sanctions if bad-faith participation in mediation comes to the attention of the court. Consequences for failing to negotiate in good faith can result in dismissal of the case or default judgment against the misbehaving party.<sup>148</sup> Parties can suffer monetary punishment, such as compensating the other party for time and lost wages, covering the full cost of the mediator, or paying the other party's attorney's fees.<sup>149</sup> While these statutes do not constitute a direct mandate on the parties, they can still have a regulatory effect on behavior, as parties will want to avoid potential sanctions down the road. They also create potential causes of action for parties that, in turn, become new fulcra that parties can use as leverage during negotiations.

#### 4. *Prescribed Topics for Mediation Discussions*

Legislators also direct parties on what—and what not—to discuss in mediation.<sup>150</sup> This prescriptiveness appears, for example, in child-custody disputes where statutes mandate parties to discuss topics like custody and visitation issues, but prohibit financial discussions related to child and spousal support.<sup>151</sup> In this type of dispute, appropriate topics for negotiation are distinguished from inappropriate topics, presumably based on policymakers' perceptions of relative imbalances of power between the parties.<sup>152</sup> Legislators appear willing to delegate decision-making authority about residential schedules, health, and education to

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<sup>147</sup> See, e.g., ME. REV. STAT. ANN. tit. 14, § 6004-A (2014) (mandating landlord-tenant mediation and requiring that “[w]hen agreement through mediation is not reached on an issue, the court shall determine that the parties made a good faith effort to mediate the issue before proceeding with a hearing”).

<sup>148</sup> See, e.g., *id.* (“If the court finds that either party failed to make a good faith effort to mediate, the court may order the parties to submit to mediation, may dismiss the action or a part of the action, may render a decision or judgment by default, may assess attorney’s fees and costs or may impose any other sanction that is appropriate in the circumstances.”).

<sup>149</sup> E.g., *id.*; see also California’s penalties for parties that fail to appear at insurance mediation without good cause. CAL. INS. CODE § 10089.81 (West 2013) (stating that the insurer shall pay the consumer for her actual expenses incurred in attending the conference plus the value of lost wages, while an insured who fails to appear loses his or her right to mediate and has to pay all costs charged by the mediator).

<sup>150</sup> For example, Texas law requires parties disputing out-of-network insurance provider payments to discuss the amount charged, whether that amount was customary, as well as whether and to whom additional costs need to be paid. TEX. INS. CODE ANN. § 1467.056 (West 2011).

<sup>151</sup> See, e.g., N.C. GEN. STAT. ANN. § 50-13.1(b) (2013) (“[C]ontested issue as to the custody or visitation of a minor child, the matter . . . shall be set for mediation of the unresolved issues as to custody and visitation . . . . Alimony, child support, and other economic issues may not be referred for mediation pursuant to this section.”).

<sup>152</sup> See Bryan, *supra* note 88; Grillo, *supra* note 88; cf. Mnookin & Kornhauser, *infra* note 216.

children's parents, but reserve the authority to determine family finances for the state courts.<sup>153</sup>

Another tactic legislators employ to direct party negotiations is to provide an exhaustive list of topics for parties to discuss in mediation. In the mortgage foreclosure mediation context, homeowners and lender representatives<sup>154</sup> can be required by law to talk in mediation about all details relating to the structure of the loan, payment history, circumstances around the default, as well as all available alternatives to foreclosure. Vermont's foreclosure mediation statute enumerates each foreclosure prevention alternative to be discussed during mediation, from loan modification to forbearance to short sale; if the foreclosing party refuses to offer any alternative or to modify the terms of the homeowner loan, then it must provide justification.<sup>155</sup> In Maine, on the other hand, the foreclosing party can also

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<sup>153</sup> N.C. GEN. STAT. ANN. § 50-13.1(b)(1)–(5) (2013):

The purposes of mediation . . . include . . . the following goals: (1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child; (2) The development of custody and visitation agreements that are in the child's best interest; (3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation; (4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and (5) To reduce the relitigation of custody and visitation disputes.

<sup>154</sup> This is a simplification—because of the securitization of home mortgages into investment instruments, most homeowners never mediate with their lenders. For an expanded explanation of how securitization impacts foreclosure negotiations, see Nussbaum, *supra* note 98, at 1893–1908.

<sup>155</sup> VT. STAT. ANN. tit. 12, § 4633(a) (2015):

During all mediations under this subchapter:

- (1) The parties shall address the available foreclosure prevention tools and, if disputed, the amount due on the note for the principal, interest, and costs or fees.
- (2) The mortgagee shall use and consider available foreclosure prevention tools, including reinstatement, loan modification, forbearance, and short sale, and the applicable government loss mitigation program requirements and any related “net present value” calculations used in considering a loan modification conducted under this subchapter.
- (3) The mortgagee shall produce for the mortgagor and mediator:
  - (A) if a modification or other agreement is not offered, an explanation why the mortgagor was not offered a modification or other agreement; and

be required, during the mediation itself, to demonstrate the calculations it conducted, including numeric inputs for the equations used to determine whether or not foreclosure is in the best interest of the loan investors.<sup>156</sup>

A statutory mandate does not guarantee compliance; thus, legislators may require the mediator to keep a record of the topics discussed to ensure parties actually have the discussions intended under the law. For example, Maryland's foreclosure mediation program requires mediators to complete a state-generated checklist of all potential alternatives to foreclosure, have the parties sign it at the conclusion of mediation, and then file the signed list with the administrative agency supervising the program.<sup>157</sup> Taken together, these statutes demonstrate that legislatures not only want parties to mediate specific kinds of disputes, but also have a particular idea about the appropriate form and content of those mediation discussions.

##### *5. Mediation as Condition Precedent to Formal Hearing*

Legislatures, in the interest of having parties communicate directly with each other before turning to formal administrative or judicial hearings, often make mediation a condition precedent to filing a formal complaint with a government

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(B) for any applicable government loss mitigation program, the criteria for the program and the inputs and calculations used in determining the homeowner's eligibility for a modification or other program.

<sup>156</sup> See, e.g., ME. REV. STAT. ANN. tit. 14, § 6321-A(13) (West 2014):

The mediator's report must indicate in a manner as determined by the court that the parties completed in full the Net Present Value Worksheet in the Federal Deposit Insurance Corporation Loan Modification Program Guide . . . . If the mediation did not result in the settlement or dismissal of the action, the report must include the outcomes of the Net Present Value Worksheet . . . . As part of the report, the mediator may notify the court if, in the mediator's opinion, either party failed to negotiate in good faith.

<sup>157</sup> MD. CODE ANN., REAL PROP. § 7-105.1(1) (West 2008):

(ii) At the commencement of a postfile mediation session, each party shall review the mediation checklist. (iii) The mediator shall mark each item on the mediation checklist as the item is addressed at the postfile mediation session. (iv) At the conclusion of a postfile mediation session, each party shall sign the mediation checklist.

The checklist used in Maryland can be found at MD. CODE REGS. 09.03.12.10 apps. OAH-3 to OAH-4, <http://www.dsd.state.md.us/artwork/090312Appendices.pdf> [<https://perma.cc/5GU7-B77V>].



entity.<sup>158</sup> These statutes, like South Carolina's medical malpractice statute, make clear that parties should sit down and talk about the perceived injury and the circumstances in which the injury occurred before filing or initiating a civil action.<sup>159</sup> Sometimes the statute transforms mediation into the first step of a formal complaint, prohibiting a party from proceeding with filing a formal pleading until the mediation process is completely exhausted.<sup>160</sup> Similarly, some statutes blur the line between formal filing and informal dispute resolution by mandating the aggrieved party to supply a statement of harm and a request for relief to the respondent as part of the pre-file mediation process.<sup>161</sup>

To demonstrate compliance with the law, the party filing the complaint may have to include a sworn affidavit with its pleading that attests to the fact that the parties attempted, in good faith, to mediate the issues addressed in the complaint,

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<sup>158</sup> See, e.g., WASH. REV. CODE ANN. § 7.70.100(1) (West 2012) (mandating mediation for all causes of action related to medical malpractice claims by requiring that “[b]efore a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial”); COLO. REV. STAT. ANN. § 8-13.5-104(5) (West 2012) (requiring nursing mothers to mediate disputes over breastfeeding in the workplace before seeking litigation). Sometimes legislatures only mandate mediation as a step before the parties can appeal. E.g., TEX. TAX CODE ANN. § 42.226 (West 2011) (“On motion by a party to an appeal under this chapter, the court shall enter an order requiring the parties to attend mediation. The court may enter an order requiring the parties to attend mediation on its own motion.”).

<sup>159</sup> S.C. CODE ANN. § 15-79-125 (2015) (requiring a plaintiff to issue a Notice of Intent to File Suit, which contains “a short and plain statement of the facts showing that the party filing the notice is entitled to relief, must be signed by the plaintiff or by his attorney, and must include any standard interrogatories,” and an affidavit of an expert witness).

<sup>160</sup> See, e.g., CAL. CIV. CODE § 910 (West 2007) (detailing “non-adversarial” prelitigation procedures for construction defect complaints, which require i) a homeowner to notify the builder and provide details of the alleged violation, ii) the builder to respond to the complaint by providing all relevant plans and documentation related to the construction project, iii) the builder to conduct inspections within a two-week timeframe and to include with any offers of repair an offer to mediate); WIS. STAT. ANN. § 218.0136 (West 1999) (“A licensee may not file a complaint or petition with the division of hearings and appeals or bring an action . . . unless the licensee serves a demand for mediation upon the other licensee before or contemporaneous with the filing of the complaint or petition or the bringing of the action.”).

<sup>161</sup> See *supra* Part IV.B.2 and accompanying notes, particularly FLA. STAT. ANN. §§ 400.011–400.0233 (West 2002). The statutory requirement to mediate, however, does not identify who must initiate mediation nor does it state explicitly that mediation is a condition precedent to filing. Indeed, the District Court of Appeals for Florida's Fifth District noted the confusion in the statute about whether failure to mediate was a bar to filing in court. *Kissimmee Health Care Assocs. v. Garcia*, 76 So. 3d 1107, 1108 (Fla. Dist. Ct. App. 2011) (upholding a lower court's decision denying nursing home operator's petition to dismiss the claim from a plaintiff who did not mediate before filing).

but were unsuccessful.<sup>162</sup> Alternatively, the mediator may be required by law to file a report or mediator's certificate with the court or administrative agency certifying that the parties attempted, unsuccessfully, to resolve the issues in good faith.<sup>163</sup> Only subsequently may the parties turn to the court or administrative agency to resolve their dispute.

## 6. Incentivizing Settlement

Finally, legislatures influence mediation outcomes by building incentives for settlement and sometimes directing mediators to make decisions for the parties. For example, some statutes create economic risk for parties that fail to settle by borrowing a technique from nonbinding arbitration to encourage settlement.<sup>164</sup> One such statute in Florida involves mandated mediation of complaints against adult family-care homes, which operate much like foster care, but for adults instead of children.<sup>165</sup> In situations where the parties do not settle, the law requires mediators to record in a written report the last settlement offer made by the defendant; if the matter proceeds to trial and the complaining party prevails, but is awarded a smaller amount in damages, the plaintiff is barred from recovering attorney's fees.<sup>166</sup> These mediation rules parallel offer-of-judgment rules.<sup>167</sup> It seems likely

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<sup>162</sup> NEV. REV. STAT. ANN. § 38.330(1) (LexisNexis 2013) ("Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, but an agreement was not obtained."). A required affidavit of a good-faith effort to resolve the dispute parallels the affidavit required in discovery disputes when filing a motion to compel.

<sup>163</sup> HAW. REV. STAT. ANN. § 667-81(a), (b) (LexisNexis 2012) (requiring the third-party neutral in informal dispute resolution regarding nonjudicial mortgage foreclosure actions to file a closing report verifying parties' attendance and participation and, if no agreement is reached, that the parties met program requirements; the foreclosing party may record the mediator's report and proceed with the foreclosure process). For more discussion on good faith, see *supra* Part IV.B.3 and accompanying notes.

<sup>164</sup> Jacqueline Nolan-Haley argues that mediation procedures are beginning to look more like arbitration in that they are increasingly adversarial and rights-based. Nolan-Haley, *supra* note 35, at 83–86, 89–91.

<sup>165</sup> "Adult family care homes are private residences licensed to provide housing, meals, and personal care services to elderly and disabled adults who cannot live independently." Providers live with the residents they serve. DEP'T OF ELDER AFFAIRS, STATE OF FLORIDA, *Adult Family Care Homes*, <http://elderaffairs.state.fl.us/doea/afch.php> [<https://perma.cc/NG7G-BZWW>] (last visited Jan. 19, 2016).

<sup>166</sup> FLA. STAT. ANN. § 429.87(2)(b) (West 2014) ("If the parties do not settle the case pursuant to mediation, the last offer of the defendant made at mediation shall be recorded by the mediator in a written report that states the amount of the offer, the date the offer was made in writing, and the date the offer was rejected. If the matter subsequently proceeds to trial under this section and the plaintiff prevails but is awarded an amount in damages, exclusive of attorney's fees, which is equal to or less than the last offer made by the

that a risk-averse complainant will accept a settlement offer in mediation rather than proceed with the cost of litigation, face the possibility of a smaller award, and then not be able to recover the attorney's fees associated with the continued litigation. This example demonstrates a situation in which the mediation process, as constructed by statute, applies special pressure on only one party, the complainant, to accept settlement offered in mediation rather than risk the uncertainty of what a judge could decide. The complainant retains the power to decide whether to accept a settlement offer, but that decision is anchored in a context of taking or avoiding a financial risk, which exists because the statute created it.

Sometimes, in incentivizing settlement, legislatures appear to take advantage of the mediator's presence as a third party. For example, some statutes require the mediator to connect parties to assistance programs, directly provide advice and counsel to the parties, or actively encourage the parties to settle the dispute.<sup>168</sup> Rarely, a statute can instruct a mediator to make a decision for the parties in the event they cannot develop a resolution on their own.<sup>169</sup> It remains unclear whether imbuing the mediator with legal authority to determine a resolution is intended to be helpful to parties that are truly at a loss for ideas or as a threat to induce parties to settle themselves (as if the mediator were to say, "if you two cannot make up your minds then I will decide and you might not like it!"). Many might argue that these forms of mandatory mediation are, in fact, not mediation at all because they violate mediation's core principles of consensus, party autonomy, and mediator neutrality. It may be that legislators intended the dispute resolution to be a mediation-arbitration process and mislabeled it "mediation." On the other hand, this may just be an articulation of how mediators' evaluations are beginning to creep toward the arbitrator's role.<sup>170</sup>

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defendant at mediation, the plaintiff is not entitled to recover any attorney's fees." This applies "only to claims for liability and damages" and not equitable relief. *Id.* § 429.87(2)(c)).

<sup>167</sup> See, e.g., Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 160–63 (2006).

<sup>168</sup> See, e.g., ARK. CODE ANN. § 2-7-308(b)(1)–(5) (2015) (outlining the responsibilities of farm-foreclosure mediators and providing that "[a]t the initial mediation meeting and subsequent meetings, the mediator shall . . . (3) Advise the farmer and creditor as to the existence of available assistance programs; (4) Encourage the parties to adjust, refinance, or provide for the payment of the farmer's debts; and (5) Advise, counsel, and assist the farmer and creditors in attempting to arrive at an agreement for the future conduct of financial relations among the parties or to arrive at a settlement which may be stipulated to in court for the resolution to the court action").

<sup>169</sup> CAL. HEALTH & SAFETY CODE § 8016 (West 2007) (requiring a mediator to issue decisions in disputes over repatriation of human remains).

<sup>170</sup> See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 378 (2009).

By obligating parties to mediate and then regulating parties' conduct through mandates or sanctions, lawmakers directly influence the mediation process and, as a consequence, its outcomes. Why, then, is a process like mediation, classically characterized by informality and a lack of prefabricated structure, being deployed in such a structured, rule-based way to resolve disputes? The remainder of this Article presents one possible explanation for this phenomenon and explores considerations for policymakers and mediation advocates when issuing these mediation mandates.

## V. MEDIATION, REGULATION, AND GOVERNANCE

Classical mediation's lack of formality and capacity to empower private parties drove its early institutionalization in courts and administrative agencies. Lawmakers' latest application of mediation, however, recasts mediation as a regulatory tool.<sup>171</sup> When substantive statutes include embedded mediation mandates or when statutes exert both formal and informal control over parties' behavior in mediation, the effect is regulation of parties' dispute processing. Mediation therefore shifts from an opportunity for private ordering into a mechanism by which disputes and disputants are governed by state intervention. These statutes should be characterized as "regulation" because it offers a more accurate description of the power dynamic between the state and its citizens than the public-private, formal-informal dichotomies that have long dominated discussions of ADR.

Yet why would lawmakers choose to embed mediation requirements into new legislation? Even more puzzling, why alter the traditional boundaries between public and private dispute resolution by selecting an informal process like mediation and then adding legal obligations that control parties' behavior? Unfortunately, for many of these statutes, evidence of clear legislative intent to answer these questions proves elusive.<sup>172</sup>

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<sup>171</sup> Regulation, like mediation, faces a definitional challenge because it takes on different meanings in different contexts. For example, legal scholars perceive regulation as an instrument of administrative law, sociologists and criminologists cast regulation as a form of social control, economists consider regulation a strategic tool for shaping market behavior, scholars of public administration define regulation as the scope of state authority, and scholars of global governance see regulation as international standards and soft norms. David Levi-Faur, *Regulation and Regulatory Governance*, in HANDBOOK ON THE POLITICS OF REGULATION 3, 3–4 (David Levi-Faur ed., 2011) [hereinafter Levi-Faur, *Regulation and Regulatory Governance*].

<sup>172</sup> Many question whether a body of legislators can have a single-minded intent and many also debate which materials indicate intent (statutory language, legislative history, testimony, statements from key legislators, press releases, etc.). For a useful discussion and review of the literature, see Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W. L. REV. 128, 128–35 (1972).

One possible explanation emerges by applying regulatory-governance theory. Regulatory governance is an interdisciplinary field that studies the interdependent relationship between governments and the governed.<sup>173</sup> This governance relationship has taken different forms throughout history. One form of regulatory governance, decentralized governance, constructs procedures that shift the power to regulate from the state to civil society in an effort to promote efficiency and render regulation more democratic, breaking down traditional lines between public and private spheres of authority.<sup>174</sup>

Decentralized governance and the idea of using procedure to shift power from the state to civil society mirrors what is happening in the dispute resolution context. Statutory mediation mandates relocate authority over dispute resolution from the state to private parties, creating opportunities for disputants to negotiate directly and resolve their conflicts without state adjudication yet within procedural parameters laid down by the state. Indeed, formalizing mediation procedure in statute can be understood as the state's effort to build procedural architecture for decentralized dispute processing. This Part first explains why mediation mandates should be defined as regulation; then briefly sets out different theoretical models of state regulatory governance; and then argues that one governance paradigm in particular—decentralized governance—offers the best model for understanding this new frontier in mediation's institutionalization.

#### A. Reframing Mediation Mandates as Regulation

One can characterize mediation as “regulation” in a number of different ways. As discussed in the previous Part, legislatures deploy a range of mediation mandates that impose different kinds of requirements on private actors. Similarly, there are different ways to define regulation, the three most common of which range from more to less directive. Regulation can be i) a “specific set of commands,” or binding, legal rules backed by sanctions; ii) “deliberate state influence” over economic and social behavior (this category includes economic incentives like taxes or subsidies, deployment of resources, and supply of

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<sup>173</sup> Or, more precisely, regulatory governance explores the formal and informal controls that government exerts over private actors through government (in)actions, which in turn are influenced by the regulated entities themselves. Levi-Faur, *Regulation and Regulatory Governance*, *supra* note 171, at xvi. “Thus governance, defined as any strategy, process, procedure, or program for controlling, regulating, or exercising authority over either animate or inanimate objects or populations, is regarded as being much broader than the traditional conception of state-centred regulation.” Peter Swan, *Governing at a Distance: An Introduction to Law, Regulation, and Governance*, in *LAW, REGULATION, AND GOVERNANCE* 1, 11 (Michael Mac Neil, Neil Sargent & Peter Swan eds., 2002) [hereinafter Swan, *Governing at a Distance*].

<sup>174</sup> See sources cited *infra* note 197.

information to the public); and iii) “all forms of social and economic influence,” whether state-based or private, deliberate or incidental.<sup>175</sup>

Mediation mandates should be thought of as regulation under each of these three definitions. For example, when legislatures mandate mediation and include sanctions for, or causes of action against, parties that do not cooperate,<sup>176</sup> they regulate parties’ dispute resolution processing according to the first, most directive idea of state regulation. The state commands parties to mediate by issuing binding, legal rules and lays out punishments should the command not be followed. Legislatures’ use of mediation mandates also constitute regulation according to the second definition, which identifies regulation as deliberate influence over socioeconomic behavior. For example, when legislatures predicate recovery of attorneys’ fees on settlement offers made in mediation or require public institutions to make mediation a mandatory first step, thereby lengthening administrative procedures,<sup>177</sup> legislatures create economic incentives for parties to negotiate rather than invest the financial resources required for litigation. And finally, statutes mandating mediation also fit the third, least directive concept of regulation. Embedding mediation into substantive statutes surely influences how disputing parties engage the question of how to resolve their differences.<sup>178</sup> These statutes

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<sup>175</sup> ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 3 (2d ed. 2012). *See also* Julia Black, *Critical Reflections on Regulation*, 27 *AUSTL. J. LEGAL PHIL.* 1 (2002) (cataloguing different conceptions of regulation and explaining a decentered understanding of regulation); BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS* 2–20 (1980) (defining regulation as “the intentional restriction of a subject’s choice of activity by an entity not directly party to or involved in that activity”); ANTHONY OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* 1–5 (1994) (defining regulation narrowly, as a politico-economic concept, with three key characteristics—directive (individuals are compelled by higher state authority), inhabiting public law, and centralized state power); Susan S. Silbey, *Organizational Challenges to Regulatory Enforcement and Compliance: A New Common Sense About Regulation*, 649 *ANNALS AM. ACAD. POL. & SOC. SCI.* 6, 7 (2013) (noting that government regulation is a way to “describe macroeconomic processes,” as well as a way to describe “the relationship between law and its consequences” (the “difference between law-on-the-books and law-in-action”); regulation is the “instrumentality of law” to organize social relations and produce “particular desired conditions”).

<sup>176</sup> *See, e.g.*, HAW. REV. STAT. ANN. § 667-82 (LexisNexis 2012) (imposing sanctions for a party failing to comply with foreclosure mediation requirements including a \$1,500 fine and, for homeowners, lifting the stay of foreclosure, and for mortgagees, imposing a stay of foreclosure).

<sup>177</sup> *See, e.g.*, OHIO REV. CODE ANN. § 3323.05(F) (LexisNexis 2013) (requiring the state board of education to create an opportunity for parents to mediate disputes involving any matter).

<sup>178</sup> *See generally* Stipanowich & Lamare, *supra* note 44 (discussing the “modern evolution” of how different ADR processes are used in the corporate environment and analyzing parties’ changing perceptions about ADR).

promote consensus-based dispute resolution as a new norm and send a message to parties that they should attempt to work out their dispute themselves rather than reflexively turning to formal adjudication with public institutions.

Thus, mediation statutes constitute regulation under each definition, in some cases as direct state control with enforcement mechanisms and in other cases as indirect activity that influences citizens' behavior or creates new societal norms. Having established that mediation mandates fit the different definitions of regulation, one can then assess different theories of regulation, or how states use regulation to govern to further certain policy objectives.

### *B. Theories of Regulatory Governance: Liberal Versus Interventionist*

Historically, governments had different policy objectives and executed their regulatory duties differently; as a consequence, different themes or models of regulatory governance have emerged. At the beginning of the twentieth century, North American and Western European states changed how they used law to govern society.<sup>179</sup> States moved away from the paradigm of classical liberalism, which uses law to protect private individuals' security and freedom by containing the power of a potentially dangerous state,<sup>180</sup> toward an interventionist theory of state governance.<sup>181</sup> Under a liberal model of governance, laws established negative liberties that placed limits on the state's ability to interfere with private individuals' positive rights to contract freely and own property. This is because the bourgeoisie of the nineteenth century wanted the same access to, and freedom in, economic markets that the ruling class and political elites enjoyed.<sup>182</sup>

However, influenced by world war and the rise of mass politics, legal theorists argued for an interventionist state that would provide a "social safety net" guaranteeing minimal living conditions and security for economically weak members of society.<sup>183</sup> This idea, strengthening public law to fix social

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<sup>179</sup> Not coincidentally, during this same period of time in the United States, called the Progressive Era, Roscoe Pound and other legal reformers were calling for changes to the American legal landscape to improve citizens' access to justice. Pound, *supra* note 59.

<sup>180</sup> Jürgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 772–73 (1996). In discussing why law holds private individuals liable for certain kinds of tort instead of public payout for damages, Oliver Wendell Holmes, Jr. wrote in *The Common Law* that state machinery "ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 96 (1881).

<sup>181</sup> Swan, *Governing at a Distance*, *supra* note 173, at 4.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 2–4 (citing 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 641, 880–89 (G. Roth & C. Wittich eds., 1978)). Specifically, in the United States, legal realists like Robert Lee Hale argued that "corrective legislation" like public works, government enterprises, and deficit financing would combat the excesses of laissez-faire capitalism and equalize bargaining power between the economically

inequalities, profoundly impacted American public policy, from Roosevelt's New Deal<sup>184</sup> to Lyndon Johnson's Great Society,<sup>185</sup> and led to a vast expansion in regulatory agencies and rules.<sup>186</sup> This fifty-year period in American history included reforms to the banking system, Social Security, housing, food safety, and labor and employment, to name a few.<sup>187</sup>

In the 1970s the interventionist model of state governance and its concomitant regulatory bureaucracy came under attack, criticized from all sides of the political spectrum for ineffectiveness and inefficiency.<sup>188</sup> Neoliberals called for

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powerful and less powerful without jeopardizing economic liberty. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606, 626–28 (1943).

<sup>184</sup> Trevor Purvis, *Regulation, Governance, and the State: Reflections on the Transformation of Regulatory Practices in Late-Modern Liberal Democracies*, in LAW, REGULATION, AND GOVERNANCE, *supra* note 173, at 28, 34–37 [hereinafter Purvis, *Regulation, Governance, and the State*]; Swan, *Governing at a Distance*, *supra* note 173, at 7.

<sup>185</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 18–32 (1990).

<sup>186</sup> From 1936 to 1977, the number of pages of federal regulations grew from 2,599 to 65,603, tripling during the 1970s. STEPHEN BREYER, *REGULATION AND ITS REFORM* 1 (1982). The Federal Register reports that in 2013 the Code of Federal Regulations consists of 166,352 pages, excluding indices and compiled Title 3 documents. OFFICE OF THE FED. REGISTER, *C.F.R. PAGE BREAKDOWN – 1975 THROUGH 2013*, chart 13 (2014), <https://www.federalregister.gov/uploads/2014/04/CFR-Actual-Pages-published1-2013.pdf> [<https://perma.cc/4SQP-ZJ2A>].

<sup>187</sup> SUNSTEIN, *supra* note 185.

<sup>188</sup> BREYER, *supra* note 186, at 2–3; Purvis, *Regulation, Governance, and the State*, *supra* note 184, at 37–38. A primary argument leveled at state regulation was that the government's regulatory apparatus had been captured, or co-opted, by the same industries it was supposed to monitor and therefore, could no longer regulate in the best interest of the public. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3–4 (1971). Another argument was that regulation was fundamentally undemocratic: regulation was the work of administrative agencies, housed in the executive branch and run by appointed, unelected bureaucrats wielding tremendous power and engaging in unchecked “empire building” not necessarily aligned with the public's interest. Critics also argued that even if the state *were* focused on advancing the public's interest, it simply lacked the capacity to manage and respond effectively to an increasingly complex, fast-paced, interconnected, and multicultural world. In addition to a lack of accountability and ineffectiveness, scholars argued that the money raised by taxes to fund the state's expansive regulatory apparatus sucked capital from businesses and individuals and the unpredictability of the regulatory process itself served as a disincentive to investment and productivity; thus, they advocated a return to classical liberal, laissez-faire, free markets. Furthermore, critics of state-sponsored social welfare programs (health care, education, social security, housing, employment, etc.) suggested that the safety net caused more harm than good because it led to perpetual reliance on the state by discouraging individuals from looking after themselves. *See, e.g.*, FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 141–43 (1973); SUNSTEIN, *supra* note 185, at 74–100; IAN AYRES & JOHN BRAITHWAITE,



deregulation, or government withdrawal from the economic sphere, and a return to regulatory governance modeled after classical liberal laissez-faire principles.<sup>189</sup> Others called for reforms to the regulatory system, one program at a time, to fix failures and make sure that state intervention indeed met its goal of advancing social welfare.<sup>190</sup> Out of this debate emerged a third paradigm for regulatory governance: decentralized regulatory governance. This new theory of governance recalibrates the power dynamic between the state and private individuals and provides the best explanation for the rise in statutory mediation mandates.

### *C. A New Theory: Decentralized Regulatory Governance*

Decentralized governance, a third theory of regulatory governance, explains why states would use mediation mandates to transfer dispute resolution authority from public adjudicative institutions, like the courts, to private disputants. Decentralized governance theory appears to balance the liberal state's values of liberty and autonomy with the interventionist state's values of equity and social welfare.<sup>191</sup> Under the paradigm of decentralized governance (which elsewhere has been called many things, including reflexive or responsive regulation,<sup>192</sup>

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RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 159–61 (Donald R. Harris et al. eds., 1992).

<sup>189</sup> The “Chicago School” comprised the chief architects of “economic theory of regulation,” which presented economic arguments for deregulation and a return to classical liberal laissez-faire markets. One component of their argument, the “public choice theory,” argued that a regulated market economy is not appropriately competitive and transparent, operating instead to the benefit of government officials; thus, regulation does not give market actors, consumers and producers a real choice about how and whether to engage in market transactions. *See* Stigler, *supra* note 188, at 3; Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 339 (1974); Sam Peltzman et al., *An Economic Theory of Regulation After a Decade of Deregulation*, MICROECONOMICS, 1989, at 1, 53–56 (1989).

<sup>190</sup> *See generally* BREYER, *supra* note 186, at 341–68 (discussing approaches to regulatory reform).

<sup>191</sup> Whether the regulatory state is in retreat or whether it has shifted to a new, third paradigm is a topic of debate among scholars, further compounded by different governments' reactions to the “Great Recession” of 2008. This Article does not attempt to resolve this debate (although the statistics from the Federal Register are certainly a persuasive argument that deregulation is not occurring, *see* C.F.R., *supra* note 186), but instead focus on the model of decentralized regulation in which the state shapes and manipulates while preserving individual choice. *See* Purvis, *Regulation, Governance, and the State*, *supra* note 184, at 37–43; *see generally* John W. Cioffi, *After the Fall: Regulatory Lessons from the Global Financial Crisis*, in HANDBOOK ON THE POLITICS OF REGULATION 642 (David Levi-Faur ed., 2011) (discussing regulation after the 2007–09 financial crisis).

<sup>192</sup> AYRES & BRAITHWAITE, *supra* note 188, at 4–5 (asserting that government regulation should not completely displace the market; involving industry in regulation

procedural regulation,<sup>193</sup> decentralized regulation,<sup>194</sup> or libertarian paternalism<sup>195</sup>) the entity being regulated is considered to have valuable knowledge or decision-making capacity that, in some instances, has greater legitimacy than the state's knowledge base or decision-making capacity.

Decentralized governance operates by replacing the paternalistic interventionism of the welfare state with procedures that allow for party autonomy, self-regulation, and greater participation in the regulatory process.<sup>196</sup> Rather than issuing demands, the state uses law to transfer responsibility for crafting and implementing those demands to other systems within civil society, such as local communities, private-sector industries, trade associations, or professional organizations.<sup>197</sup> "Laws, therefore, do not specify the substantive ends to be achieved but rather encourage the informational and governance capacities of organizations," yet without abdicating the goal of regulating in the interests of the common good.<sup>198</sup> Through procedures like deliberative democracy, a process for inclusive group decision making, regulated entities can inform regulation. In

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allows for a more tailored response by government). *See generally* PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 73–113 (1978).

<sup>193</sup> Habermas, *supra* note 180, at 776–80 (identifying a third, proceduralist paradigm in law that is distinct from classical liberalism and the interventionist social welfare state in that administrative procedures exist to "steer" individuals while still allowing individual autonomy).

<sup>194</sup> *See* Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEG. PHIL. 1, 2–10 (2002).

<sup>195</sup> Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161–62 (2003) [hereinafter Sunstein & Thaler, *Libertarian Paternalism Is Not an Oxymoron*] (considering libertarian paternalism as a means of influencing behavior while respecting free choice, or "self-conscious efforts, by private and public institutions, to steer people's choices in directions that will improve the choosers' own welfare"); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83 (rev. and expanded ed., 2009) [hereinafter THALER & SUNSTEIN, *NUDGE*] (presenting a variety of examples and recommendations for "choice architecture," structuring law and public policy using libertarian paternalism to improve health, schools, retirement saving, etc.).

<sup>196</sup> *See* Swan, *Governing at a Distance*, *supra* note 173, at 11–14 ("[R]ecent approaches emphasize a 'decentring' of a state that is but one of a plurality of sites of governance and regulation.").

<sup>197</sup> *See* Alan Hunt, *Legal Governance and Social Relations: Empowering Agents and the Limits of Law*, in *LAW, REGULATION, AND GOVERNANCE*, *supra* note 173, at 55, 61; Swan, *Governing at a Distance*, *supra* note 173, at 8–9; Black, *supra* note 194, at 1, 15–20. Many use self-regulating professions like the legal profession as an example of decentralized regulation. *See also* Michel Foucault, *The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS, 208–26 (Hubert L. Dreyfus & Paul Rabinow eds., 2d ed., 1982) (describing the relationship between individual choice and state control with theories of "responsibilization" and "governmentality").

<sup>198</sup> Swan, *Governing at a Distance*, *supra* note 173, at 14.

theory, delegating regulatory tasks to non-state actors can allow regulation to become customized and responsive to the circumstances of different groups.<sup>199</sup> And, government can empower private entities to police one another. Consider, for example, delegating the state's watchdog or enforcement powers to public interest groups, like the Sierra Club or National Wildlife Federation, by enacting a statute that gives them legal standing to bring a lawsuit against an environmental polluter.<sup>200</sup>

It is important to note that while decentralized governance theory conceives of state regulation as procedural rather than interventionist, the social-equity objectives remain. Under this theory, the state should use law to empower individuals, powerful and marginalized alike, to take responsibility for, and improve, some aspect of their own condition, like health or employment.<sup>201</sup> To create this shift in responsibility, state policymakers and deputized private entities employ legal and extralegal incentives, such as default rules for retirement savings, comparative negligence regimes, or reduced home insurance premiums for installing security systems.<sup>202</sup> Individuals exercise choice and take responsibility for those choices, but do so in a closed universe, steered or "nudged" in directions that improve their own welfare.<sup>203</sup> Thus, policymakers increasingly become "choice architects"<sup>204</sup> and facilitators, overseeing legal regimes that create processes in which social and economic actors retain individual choice, but do so in furtherance of the public good.<sup>205</sup>

The theory of decentralized governance provides a helpful model to explain the institutionalization of mediation and the multi-dimensional relationship

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<sup>199</sup> As the theory goes, delegating government intervention to private actors allows the government to harmonize its public-interest regulatory goals more closely with laissez-faire market efficiency. But this does not mean that industry gets to make up its own rules to the game and also be the referee. AYRES & BRAITHWAITE, *supra* note 188, at 158–62.

<sup>200</sup> *Id.*

<sup>201</sup> Sunstein & Thaler, *Libertarian Paternalism Is Not an Oxymoron*, *supra* note 195, at 1167–70 (2003) (indicating that people often make choices against their own self-interest, not because they are exercising true preferences based on rational deliberation (as *homo economicus* might), but because of influences, both subtle and overt, that have been studied and demonstrated by behavioral economists).

<sup>202</sup> Hunt, *supra* note 197, at 63.

<sup>203</sup> See Sunstein & Thaler, *Libertarian Paternalism Is Not an Oxymoron*, *supra* note 195, at 1162–63, 1196–1201. It is worth pointing out that Thaler and Sunstein, while arguing for individual autonomy and choice, do not suggest that individuals know what is best for themselves. Using findings from behavioral economics, Thaler and Sunstein demonstrate that individual decision makers are highly susceptible to suggestion and frequently make irrational decisions against their self-interest. Choice architecture exploits this human tendency by deliberately building choice intersections, or points at which someone can choose one fork in the road over another, to influence people to make a choice that *does* serve their best interests. *Id.*

<sup>204</sup> *Id.* at 1161.

<sup>205</sup> Hunt, *supra* note 197, at 68 (citation omitted).

between public and private power. Perhaps not coincidentally, the judicial reform movement that led to the institutionalization of mediation in American courts and administrative agencies<sup>206</sup> occurred at the same time that the interventionist model of regulatory governance faced criticism in the 1970s. Just as judicial reform advocates sought to use ADR procedures like mediation to empower disputants and provide efficient access to justice, regulatory reforms redesigned regulatory procedure to reinsert autonomy and individual choice into the federal government's regulatory apparatus.

Thus, statutory mediation mandates should be viewed as decentralized governance, or state regulation that constructs procedural architecture to advance the general public's welfare. Rather than state institutions maintaining a monopoly on dispute resolution through adjudication in judicial and administrative contexts, the state sends parties through a mediation process instead of prescribing an outcome. Laws requiring disputing parties to mediate exemplify the trend toward "proceduralism"; law is less directed to supply rules for decision than it is to introduce procedures through which substantive decisions may be reached."<sup>207</sup> Disputing parties negotiate directly, assess the nature of the harm suffered and the responsibility owed, and ultimately develop their own resolution.<sup>208</sup> The state requires parties to negotiate and allows them to retain a degree of choice and autonomy within the mediation process. Parties can still determine mediation outcomes: whether to agree or not to agree, and according to what terms.

#### VI. RECOMMENDATIONS FOR LEGISLATURES DESIGNING DECENTRALIZED DISPUTE RESOLUTION

Using mediation as a decentralized regulatory vehicle is neither categorically "good" nor categorically "bad." Rather, formalizing certain components of the mediation process can provide benefits or impose unfair burdens on parties. In some situations, requiring disputants to attempt private resolution through mediation provides a benefit by forcing early, direct communication in a moderated environment. Yet while a highly structured, rule-based mediation process can neutralize power imbalances for some parties, formalizing mediation can also create leverage that elevates one side's negotiation power over the other. Thus, decisions about which elements of the mediation process to formalize should be made carefully.

The following sections take a critical look at the effect of certain elements of mediation statutes on the parties themselves. It then proposes recommendations for how legislatures can design procedural architecture that maximizes the potential benefits of mediation and minimizes the potential harms.

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<sup>206</sup> See *supra* Part III.A.

<sup>207</sup> These echoes of Lon Fuller are found in Hunt, *supra* note 197, at 58.

<sup>208</sup> See *supra* Part II.

*A. How to Build Efficiency and Equity into the Process*

Relocating dispute resolution authority from state actors to private individuals has the potential to yield benefits for the disputing parties. Disputants who negotiate directly in mediation may resolve their differences with reduced costs, greater efficiency, and more tailored remedies than the state can provide—the very “production” and “quality” arguments that first fueled mediation’s institutionalization.<sup>209</sup> The notion that parties can be empowered to resolve their differences on their own, without state intervention, is rhetorically compelling.

However, rather than “surrendering conflict to existing power constellations,”<sup>210</sup> legislators should design mediation architecture that promotes a fair process and, as a consequence, advances just outcomes. Individuals with limited economic, social, or cultural capital, who may be vulnerable in negotiations with “repeat players,”<sup>211</sup> can benefit when legislatures include certain requirements in their statutory mandates. For example, as this section discusses, requiring mediation participants to have settlement authority, specifying what information to exchange, and prescribing topics for discussion can help parties reach more fully informed, consensus-based resolutions than they might otherwise.

It may seem paradoxical that in order to ensure that an informal process like mediation does not compromise social justice (a concern also raised when mediation was first institutionalized),<sup>212</sup> some parts of the mediation process must become formalized. Yet formalizing the mediation process will be necessary if states continue to embed mediation mandates into substantive law because states have an ethical responsibility to design dispute resolution processes that promote, rather than undermine, fairness.<sup>213</sup>

*1. Require Settlement Authority*

A statute requiring parties with decision-making authority to attend mediation exemplifies the kind of libertarian paternalist choice architecture that promotes fair and efficient negotiations. The statute preserves parties’ liberty to choose whether and how to settle the dispute, a defining characteristic of classical mediation, but makes resolution possible by mandating settlement authority as a foundational legal requirement of parties in mediation. This requirement can prove particularly

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<sup>209</sup> See *supra* Part III.B.

<sup>210</sup> GUNTHER TEUBNER, *Juridification—Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW 3, 8 (Gunther Teubner ed., 1987).

<sup>211</sup> Galanter, *supra* note 134, at 97.

<sup>212</sup> See generally Grillo, *supra* note 88, at 1555–61; Delgado et al., *supra* note 88, at 1361–67; Bryan, *supra* note 88, at 446–81.

<sup>213</sup> See Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 211–19 (2009).

useful when one party is an individual and the other an organization, as is often the case for consumer and corporate disputes.

## 2. *Establish Rules for Information Exchange*

Similarly, legislatures can effectuate informed and efficient negotiations by prescribing discussion topics and identifying what information to exchange prior to or during mediation. Parties can know in advance the agenda for the mediation and come prepared. It also can have the effect of correcting imbalances of power between the parties and forcing a party that has more information—or that may be unlikely to cooperate—to cover in depth all the topics the less informed or less empowered party wants to cover. Mandating information exchange and prescribing topics for discussion may protect a less experienced or sophisticated party, especially one without legal representation, and help make mediation discussions more informed without significantly burdening the other party. This requirement can also help to protect the mediator's neutrality by assigning responsibility for producing information to the parties so that the mediator's role does not become that of inquisitor.

## 3. *Acknowledge Imbalances of Power and Make Informational Support Available*

Legislators cannot assume parties will be equally matched in mediation and therefore need to consider ways to empower weaker parties.<sup>214</sup> It seems impossible to imagine how a statute could correct for every potential imbalance of power, which can be highly contextual and may include differences in language ability, legal knowledge, financial resources, time, and prior experience. However, if parties in mediation are expected to police each other in a reciprocal manner, all parties need to be able to advocate for their interests and understand the other party's motivations.<sup>215</sup> One recommendation is to give the less sophisticated party, for example a homeowner approaching foreclosure mediation with the investor representative, access to information or professional assistance before attending mediation.<sup>216</sup> Some foreclosure mediation programs require parties to meet with a

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<sup>214</sup> Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 25–26 (1999) ("To put it simply, the 'Haves' come out ahead by being able to choose and manipulate what process will be used to enforce substantive rights."). While requiring mediation may remove powerful parties' ability to choose a dispute process favorable to them, mediation may well be their process of choice.

<sup>215</sup> Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 361–62 (1978) ("[I]n a relation of reciprocity each party is expected to stand up for himself . . . however, we must know, if we are to obtain what we want, what the other fellow wants.").

<sup>216</sup> Attorneys can be useful to parties negotiating "in the shadow of the law" by helping parties figure out their real interests, explaining applicable legal norms, and, if the case were to continue to litigation, probable outcomes. Yet, attorneys can also frustrate

housing counselor or attorney in a brief advice session prior to mediation.<sup>217</sup> Other jurisdictions train and sponsor volunteer attorneys who can provide limited representation in mediation.<sup>218</sup>

If, after considering potential power imbalances, legislatures cannot provide adequate support for vulnerable parties, then perhaps an altogether different dispute resolution process should be selected. Mediation is predicated on the theory that parties craft and choose their own settlement terms; if policymakers have concerns about those choices in situations where parties are unequally matched, then mediation may not be the right process choice. Other processes in which a third party analyzes parties' legal rights and responsibilities, such as nonbinding arbitration or early neutral evaluation by an experienced attorney, would be a better fit.

### *B. How to Avoid Adverse Consequences of Formalization*

Despite the potential benefits of further institutionalizing mediation, there are potential risks both from embedding mandatory mediation into individual statutory regimes and formalizing certain aspects of the mediation process. Formalizing mediation with legal mandates adds procedural complexity to dispute resolution—complexity that can sometimes burden the parties and frustrate the state's effort to help parties become more actively engaged in resolving their disputes. Some legislatures' statutory directives may generate confusion about the mediation process, spur new and unintended causes of action, or serve as barriers for injured parties seeking redress.

Further, for these statutes, as forms of decentralized governance, to effectuate their intended social benefit, parties must be incentivized to participate and also be able to police each other. Yet legislatures have used mediation to regulate disputes, particularly those between businesses and individual consumers, where parties are

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private negotiations by relying too heavily on legal rules and precedents. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 985–88 (1979).

<sup>217</sup> See WASH. REV. CODE ANN. §§ 61.24.031, .160, .163 (West 2004 & Supp. 2015) (requiring the foreclosing party to contact homeowners; provide information about housing counselors, attorneys, and mediation; and inform the homeowner that failure to meet with a housing counselor to discuss alternatives to foreclosure may forfeit the opportunity to mediate).

<sup>218</sup> See, e.g., *Foreclosure Prevention Pro Bono Project*, PRO BONO RESOURCE CENTER OF MARYLAND, <http://probonomd.org/about-us/about-foreclosure-prevention> [<https://perma.cc/J6LW-W8GM>] (last visited Jan. 19, 2016) (providing free training, malpractice insurance, and mentoring support for attorneys who volunteer to provide limited representation to homeowners in foreclosure). This approach would require adjustments to the jurisdiction's Rules of Professional Conduct to enable attorneys to provide assistance in a limited capacity without fear of client conflicts. See MODEL RULES OF PROF'L CONDUCT r. 6.5 (AM. BAR ASS'N 2013).

not evenly matched in sophistication or negotiation power and therefore cannot effectively police each other. Legislatures must keep consumer protection in mind when considering a decentralized, procedural regulation like mediation and may find that for disputes of particular concern to the public, a more interventionist approach to regulation may prove a better policy choice.

### 1. Aim for Procedural Uniformity and Predictability

Proliferating statutes containing bespoke mediation procedure can create problems if it becomes too difficult for parties to know what to expect of the mediation process and, in turn, what is expected of them.<sup>219</sup> When legislatures construct different dispute resolution procedures that are all called “mediation,” each with particularized legal rights and responsibilities based on the type of dispute, legislators do a disservice if the public (and the legal community) does not know what to expect from a legally mandated dispute resolution process. For example, in some statutes, the mediator may be required to assess parties’ good-faith participation, issue sanctions if certain documents are not provided, or make decisions about how unresolved issues should be settled, while other statutes prohibit such behavior from the mediator. If legislators seek to impose some element of consistency, one approach is adopting the Uniform Mediation Act (“UMA”) and having it govern all statutory mediation requirements, as Illinois does.<sup>220</sup> Indeed, one of the motivations for developing the UMA was to promote uniformity and consistency of mediation practice throughout a single jurisdiction.<sup>221</sup> Or a state could develop its own mediation statute to establish what the mediator’s role and conduct will be and what parties can expect with respect to confidentiality.<sup>222</sup>

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<sup>219</sup> This concern echoes the calls for transsubstantive procedure, or a procedure that is uniform across case types, which propelled the writing and passage of the Federal Rules of Civil Procedure. Whether uniformity has served the interests of civil justice remains a contested issue, eight decades later. Subrin, *The Limitations of Transsubstantive Procedures*, *supra* note 97, at 391 (“Since . . . procedural decisions can, and often do, materially influence substantive application, the rules cannot provide a uniformity of result.”); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 840 (2010) (“[E]fforts to harmonize or approximate procedural systems . . . are championed with promises of efficiency, simplicity, and uniformity.”).

<sup>220</sup> See 765 ILL. COMP. STAT. ANN. 605/32 (West 2009 & Supp. 2015) (requiring all mediations under this section to be governed by the Uniform Mediation Act).

<sup>221</sup> See *Prefatory Note* to the UNIF. MEDIATION ACT, *supra* note 12 (discussing the guiding principles behind the UMA). To date, the UMA has been adopted in eleven states (Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington) and the District of Columbia. *Legislative Fact Sheet — Mediation Act*, UNIF. L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act> [<https://perma.cc/4YWC-BV9D>] (last visited Mar. 22, 2016).

<sup>222</sup> See, e.g., Mediation Confidentiality Act, MD. CODE ANN., CTS. & JUD. PROC. § 3-1801(b), (d)(1)–(2) (LexisNexis 2013) (defining “mediation” as a process of working with



Then again, there may be perfectly good reasons to vary construction of mediation processes if those adaptations make the process better suited for a type of dispute or set of disputants. Ideally, legislatures are aware of these different variations and make informed decisions about which architectural design choices to make, for example to improve communication rather than spread confusion. It may be unrealistic, however, for legislators to have expertise in both the substantive nature of a dispute as well as the technicalities of mediation procedural design. Some states have therefore established stand-alone mediation and dispute resolution agencies that provide mediation expertise to the state. These agencies are charged with promulgating rules for mediating specific disputes and providing a range of subject-specific mediation services.<sup>223</sup>

2. *Avoid Creating New Causes of Action, Especially When Parties' Negotiation Power Is Likely Mismatched*

One important consequence of a decentralized, procedural approach to regulation is that, ironically, more procedure leads to more, rather than less, law by spawning new legal rights and responsibilities.<sup>224</sup> What once were informal processes, like negotiation, now become more formalized and solidified in law. Formalizing mediation with new substantive legal obligations, such as requirements for informal pleading,<sup>225</sup> good-faith participation,<sup>226</sup> and prescribed topics for mediation discussions,<sup>227</sup> also means potential new causes of action if

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impartial mediators to reach a voluntary agreement and “mediator” as a person who “[a]ssists parties in reaching their own voluntary agreement” and who adheres to the Maryland Standard of Conduct for Mediators). Maryland does not achieve complete, statewide consistency because the statute does carve out a variety of exceptions for certain types of mediations, such as foreclosure and some court-connected mediation programs. *See id.* § 3-1802(b).

<sup>223</sup> *See, e.g.*, CAL. GOV'T CODE § 3600 (West, Westlaw through 2015 Reg. Sess.) (establishing the California State Mediation and Conciliation Service); N.J. STAT. ANN. § 34:13A-4 (West 2011) (establishing the State Board of Mediation in the Department of Labor).

<sup>224</sup> This phenomenon is also called “juridification.” *See generally* Teubner, *supra* note 210. A second consequence is the blurring of lines between public and private spheres—state compelled mediation occupies both of these. Purvis, *Regulation, Governance, and the State*, *supra* note 184, at 42; *see also* Hunt, *supra* note 197, at 58 (“[M]any organizations replace informal means of dispute resolution by formalized law-like systems of rules and procedures.”).

<sup>225</sup> *See, e.g.*, FLA. STAT. ANN. § 400.0233 (2) (West 2012) (requiring mediation before a resident of a nursing home can file suit for negligence); discussion *supra* Part IV.B.5.

<sup>226</sup> *See, e.g.*, ME. REV. STAT. ANN. tit. 13, § 1958-B(1) (West 2005) (requiring dispute resolution in agricultural marketing and bargaining); discussion *supra* Part IV.B.3.

<sup>227</sup> *See, e.g.*, VT. STAT. ANN. tit. 12, § 4633 (West, Westlaw through 2015–2016 First Sess.) (requiring mediation in foreclosure proceedings); discussion *supra* Part IV.B.4.

those obligations go unmet. A number of consequences flow from hyperlegalizing mediation, and legislators should proceed with caution.

First, by creating new causes of action and making litigation more complex, legislators may inadvertently frustrate their efforts to relocate dispute resolution within civil society. If one reason for legislatures' decision to embed mediation requirements into statutes is to reduce state involvement in dispute resolution and to make dispute processing more accessible, codifying the mediation process frustrates that goal by creating two, three, sometimes four additional issues, unrelated to the original substantive claim, for parties to fight about in court.<sup>228</sup> Consequently, not only are causes of action multiplied by formalizing mediated negotiations, any subsequent litigation is also rendered more complex. This has additional significance if only one of the parties has financial resources or capacity to sustain prolonged, complex court litigation after failed negotiations. Thus, inserting legal requirements into the mediation process can increase, rather than decrease, the time and money ultimately spent litigating in the courts and may give powerful parties an unfair advantage.

Second, while new causes of action created by formalizing mediation exemplify decentralized regulatory governance because they deputize private parties to police each other, problems arise when the parties are unequally matched. Some mediation statutes deliberately create causes of action to encourage cooperative negotiation behavior and deter uncooperative negotiation behavior. For example, if a party fails to produce the required documents listed in the statute, the other party can, theoretically, turn to the courts to report the bad behavior and seek a remedy like enforcement of the document production or sanctions.<sup>229</sup> In theory, knowing that the well-behaved party has this power should incentivize good behavior from a potential misbehavior. Behavioral checks-and-balances can work if the parties are equally matched in financial capacity and legal sophistication. But in reality that is not always the case. Inserting a cause of action into a mediation between unequal parties, for example a large business and an individual, non-corporate consumer, can doubly work against the less powerful party—the less powerful party will not be able to provide an adequate check on the more powerful party and, knowing its behavior goes unchecked, the more powerful party may be more inclined to misbehave.

This is especially true when legislators build in a good-faith requirement to a statutory mediation process. It may seem more expedient to establish a legal requirement for good-faith participation in mediation, enabling parties to police

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<sup>228</sup> Others have discussed this phenomenon, called “satellite litigation,” in relation to good-faith requirements. See Lande, *Good Faith Requirement*, *supra* note 142, at 8–9 n.10.

<sup>229</sup> See, e.g., *Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275, 1281 (Nev. 2011); *Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1287 (Nev. 2011). It is important to note that in these cases, the mediator, and not the other party, was required to report failures to comply with mediation statutory requirements. See *Levy*, 255 P.3d at 1277; *Pasillas*, 255 P.3d at 1284.

each other on the front end of dispute processing, rather than for the government to intervene downstream to determine whether parties took their duty to negotiate seriously. Yet, the good-faith requirement inserts a wildcard into the parties bargaining relationship. One party can threaten to file a bad faith claim against an opposing party if that party refuses to agree to certain terms. Thus, good-faith requirements can become a potential weapon to be exploited by the more ruthless negotiating party against the other.<sup>230</sup> And, as discussed above, empowering the mediator to act as a check against party misbehavior not only tampers with the mediator's neutral role, but also undermines confidentiality.<sup>231</sup>

Thus, when constructing statutory mediation procedures, legislatures need to be aware when they are creating new causes of action. Sometimes inserting causes of action promotes decentralized regulation and effectuates high quality negotiations. But, disputes with inherently mismatched parties may require more direct state intervention than a formalized mediation procedure since it cannot be assumed the parties will regulate each other in mediation.

### 3. *Avoid Obstructing Access to Justice*

Another important issue for legislators to understand is that formalizing the mediation process can make mediation harder, not easier, to access. For example, although requirements to exchange information and documentation can lead to more informed and efficient negotiations, they can also serve as a disincentive to people who have suffered a harm from seeking redress. A person with a complaint against a nursing home in Florida must, by statute, first document the harm and then obtain an attorney's imprimatur that valid grounds exist for legal action before she can proceed to mediation, a statutory prerequisite to filing a claim in court.<sup>232</sup> It is not difficult to imagine how potential plaintiffs lacking the time, financial resources, and emotional energy to complete each of these steps may be discouraged from stepping forward. As others have noted, "one person's discouraged plaintiff is another's quashed nuisance lawsuit,"<sup>233</sup> suggesting that procedural roadblocks like mandatory mediation may prevent lawsuits that lack legal merit from reaching court yet also discourage individuals with valid claims from coming forward. When creating mediation procedure, legislatures must consider whether one party will bear a heavier burden than the other to reach the negotiation table.

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<sup>230</sup> Lande, *Good Faith Requirement*, *supra* note 142, at 9.

<sup>231</sup> See *supra* note 142 and accompanying text.

<sup>232</sup> FLA. STAT. ANN. § 400.0233(2) (West 2012).

<sup>233</sup> Joseph W. Doherty et al., *Introduction to CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM* xiii, xviii (Joseph W. Doherty et al. eds., 2012).

#### 4. *Decouple Mediation Process from Policy Outcomes*

Policymakers must further recognize that a statutory mediation mandate does not guarantee particular policy outcomes and that sometimes more interventionist regulation will be necessary, particularly for business-consumer disputes about which the public may have particular concern. Indeed, if policymakers attempt to protect consumers by formalizing their negotiations with more powerful business interests, as discussed above, then those powerful players may be unwilling to negotiate. As David Luban notes, if the outcomes of mediated negotiations differ significantly from the outcomes of unmediated negotiations, then powerful players have little incentive to participate<sup>234</sup> and consumer protection goals remain unattained.

This prediction played out in Hawaii's mandatory dispute resolution program for nonjudicial, contractual foreclosures. In an effort to protect homeowners, policymakers passed a law mandating foreclosure mediation as a way to interrupt automated foreclosure practices that often resulted in mistakes or improper denials of loan modification requests.<sup>235</sup> The loan servicers found the statutory dispute resolution process so overly legalistic and cumbersome that they chose to pursue foreclosure through the courts, rather than participate.<sup>236</sup> Some in the loan servicing industry, particularly in those jurisdictions where mediation could not be bypassed, complained that requiring negotiations with homeowners in foreclosure mediation added costs, gave homeowners an opportunity to remain in their homes longer without making mortgage payments, and wasted time by delaying the inevitable. From the lender's point of view, there was nothing to negotiate: a loan was in default, the home was collateral on the loan, and the remedy under the law was for the lender to foreclose and recoup the value of the loan.<sup>237</sup>

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<sup>234</sup> Luban, *supra* note 14, at 396–98.

<sup>235</sup> Nussbaum, *supra* note 98, at 1918; *see supra* note 98 and accompanying text.

<sup>236</sup> Loan servicers' refusal to participate in nonjudicial foreclosure mediation occurred in Hawaii and also in Oregon. Andrew Gomes, *Foreclosure Bill Aims to Increase Mediation*, HONOLULU STAR ADVERTISER (Feb. 6 2013, 1:30 AM), <http://www.staradvertiser.com/business/foreclosure-bill-aims-to-increase-mediation> [<https://perma.cc/YHU2-4V7Q>]; Elon Glucklich, *Some Lenders Sidestep Oregon's Foreclosure Mediation*, THE BULLETIN (Bend, Or.) (Dec. 9 2013, 12:01 AM), <http://www.bendbulletin.com/home/1372327-151/some-lenders-sidestep-oregons-foreclosure-mediation> [<https://perma.cc/6MBC-F793>].

<sup>237</sup> *See, e.g.*, Peter Goonan, *Massachusetts Bankers Association Raises Objections to Springfield Anti-Foreclosure Ordinances, Raising Legal Issues*, MASSLIVE (Sept. 26, 2011, 4:30 PM), [http://www.masslive.com/news/index.ssf/2011/09/massachusetts\\_bankers\\_associat.html](http://www.masslive.com/news/index.ssf/2011/09/massachusetts_bankers_associat.html) [<https://perma.cc/4URD-MAXD>]; Jim Gallagher, *Foreclosure Mediation Angers Bankers, Pleases Housing Advocates*, ST. LOUIS POST-DISPATCH (Aug. 26, 2012, 12:15 AM), [http://www.stltoday.com/business/columns/jim-gallagher/foreclosure-mediation-angers-bankers-pleases-housing-advocates/article\\_92970e80-e8bc-11e1-8a25-](http://www.stltoday.com/business/columns/jim-gallagher/foreclosure-mediation-angers-bankers-pleases-housing-advocates/article_92970e80-e8bc-11e1-8a25-)

Ultimately, decentralized governance alone was not enough to address the lender and loan servicer behavior that contributed to the foreclosure crisis; a more interventionist governance approach was also needed. Indeed, the federal government created the Consumer Financial Protection Bureau in 2010 with passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, a new federal agency tasked with supervising companies, restricting unfair or abusive practices, and enforcing federal consumer financial protection laws.<sup>238</sup> And in 2012, the state attorneys general from forty-nine states,<sup>239</sup> the District of Columbia, and the U.S. Department of Justice together sued the largest loan servicers for improper business practices leading up to, and during, the residential mortgage foreclosure crisis.<sup>240</sup> Thus, policymakers need to be aware that, while it may appear more politically expedient to require parties to mediate and then shape their behavior within the context of mediation, direct government intervention may be required to achieve the intended policy outcome.

Finally, making decisions about policy reform requires access to information, but the mediation process can obscure information with its confidentiality

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0019bb30f31a.html [https://perma.cc/83DC-YHJG]. Indeed, Florida's statewide foreclosure mediation program failed because of resistance by lender representatives to comply with the program. Kim Miller, *Panel: Kill Foreclosure Mediation*, PALM BEACH POST (Oct. 21, 2011, 8:00 PM), <http://www.palmbeachpost.com/news/news/real-estate/panel-kill-foreclosure-mediation/nLy5S> [https://perma.cc/9DQZ-XDWR]; Kim Miller, *S. Florida Judges Brace for a Possible Fallout of the Foreclosure Mediation Program*, PALM BEACH POST (Oct. 25, 2011, 6:44 PM), <http://www.palmbeachpost.com/news/news/real-estate/s-florida-judges-brace-for-a-possible-fallout-of-t/nLy99> [https://perma.cc/35ZD-ZPR5]. However, not all jurisdictions faced resistance from bankers associations. See, e.g., John L. Olsen, *Residential Foreclosure Mediation: The Delaware Model*, DELAWARE BANKER (Del. Bankers Ass'n) Fall 2009, at 10, 12.

<sup>238</sup> Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301, 5511 (2010); *About Us*, CONSUMER FINANCIAL PROTECTION BUREAU (Jan. 11, 2016), <http://www.consumerfinance.gov/the-bureau> [https://perma.cc/Y3RP-LUTR].

<sup>239</sup> The only state not to join the litigation was Oklahoma.

<sup>240</sup> The allegations brought against defendant mortgage servicers included misconduct leading to "issuance of improper mortgages, premature and unauthorized foreclosures, violation of service members' and other homeowners' rights and protection, the use of false and deceptive affidavits and other documents, and the waste and abuse of taxpayer funds." Complaint at 8–9, *United States v. Bank of Am. Corp.*, 753 F.3d 1335 (D.D.C. 2014) (No. 13-5112). Ultimately, the Attorney General settled with five of the largest loan servicers, Ally/GMAC, Bank of America, Citi, JP Morgan Chase, and Wells Fargo, for \$50 billion. *About the Settlement*, JOINT STATE-FEDERAL NATIONAL MORTGAGE SERVICING SETTLEMENTS, <http://www.nationalmortgagesettlement.com/about> [https://perma.cc/PYV5-BE9Y] (last visited Mar. 26, 2016); *Justice Department, Federal and State Partners Secure Record \$13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages*, U.S. DEP'T OF JUSTICE (Nov. 19, 2013), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement> [https://perma.cc/65T3-MDYP].

protections and individualized approach to dispute resolution. Therefore, legislatures should spend time considering whether “nudging” more disputes to resolve out of the public eye, erodes transparency and undermines the state’s interest in protecting consumers. Will families be able to assess the safety practices of an adult care home if previous complaints were resolved in confidential mediation sessions? How can consumer advocates identify patterns of misconduct by loan servicers or telecommunications carriers if individual claims are resolved quietly, one at a time? Whether the state should relinquish its power over dispute resolution outcomes, and whether parties, often unequally matched, can actually regulate each other in settlement negotiations, are questions hotly debated by scholars.<sup>241</sup> Policymakers should be thoughtful about what kinds of disputes may have significance to the public. Some existing proposals for preserving public information while encouraging settlement include requiring parties to report the outcome of settlements negotiated in mediation in a national database<sup>242</sup> or for the parties themselves to make mediated settlement terms publically available.<sup>243</sup>

As this discussion demonstrates, statutory mediation mandates are not neutral because they create procedures that have substantive regulatory effects. Even though parties must agree to any outcomes of mediation, the way in which the process is structured influences parties’ negotiation leverage. Consequently, the

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<sup>241</sup> Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 468 (2006); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–90 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2642–47 (1995); Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268–69 (1984); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2667–71 (1995); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 498–506 (1985). Menkel-Meadow coined the term “jurisprudes” to refer to those who are critical of mediation and negotiation because they appear to compromise legal rights and obligations. Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context*, 54 J. LEGAL EDUC. 7, 9, 20 (2004).

<sup>242</sup> Stephen Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM, *supra* note 233, at 143, 153–57 (the lack of information about civil claim settlements in the United States makes it difficult for plaintiffs and defendants to obtain accurate “pricing” information for claims, but this problem could be mitigated if basic information about settlements were reported in a national database).

<sup>243</sup> Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM, *supra* note 233, at 184, 185–86 (one way to increase transparency about the civil justice system is to expand mandatory claim-level reporting by liability insurers covering automobile accidents, medical injuries, products injuries, occupational injuries and worker compensation).

design of, and infrastructure surrounding, the mediation process can bolster or diminish the quality of mediated negotiations and their subsequent outcomes. It is the work of governments to determine what to regulate and how to regulate, and dispute resolution is no exception. Therefore, legislatures seeking to shift authority for dispute resolution from the state to private parties have important decisions to make about how to formalize dispute resolution procedures that advance public values of efficiency, equity, and fairness.

## VII. CONCLUSION

Mediation became a popular dispute resolution process in the United States beginning with the judicial reform movement of the late 1970s. In the intervening years, mediation has become “institutionalized” and an established component of dispute resolution procedure in courts and administrative agencies. Today, with greater frequency than ever before, legislatures deploy mediation as a means of regulating how private parties resolve their disputes. These statutes exemplify decentralized governance: disputing parties resolve their conflicts without state adjudication yet within procedural parameters laid down by the state, shifting responsibility for resolving disputes from the state to the parties themselves.

State legislatures deploy mediation in two primary ways. First, they make mediation mandatory for parties seeking to assert or defend specific statutory rights. Through these mandates, legislatures expand the state’s reach, catching parties early in the conflict, sometimes before they have submitted their dispute to a court or an administrative agency. Second, legislatures not only require mediation, but also include additional legal requirements. In so doing, legislatures directly or indirectly influence the resolution of the dispute by removing party discretion, incentivizing settlement, or changing parties’ negotiation leverage.

Legislators, in an effort to make private parties responsible for dispute resolution, need to be careful about which aspects of the mediation process they formalize. They cannot always assume that, when it comes to redressing certain kinds of harms, private disputants are adequately positioned—and capable—to work together to resolve their disputes and reach fair outcomes. In some ways, formalizing parts of the mediation process adds structure that can help parties engage in more informed and efficient negotiations. Yet in other ways, these statutory dispute resolution regimes add complexity to the dispute resolution process and depend on the parties’ ability to police each other. This complexity can burden parties and frustrate the state’s effort to make them more actively engaged in resolving their disputes.

Ultimately, by enacting these mandatory mediation statutes, it appears legislators have generated a paradox. These statutes anchor dispute resolution within civil society, encouraging parties to negotiate directly and empowering them to take responsibility for resolving conflicts without state intervention. Yet in order to ensure fairness and balance disparate negotiating power or, perhaps more cynically, to increase the likelihood that parties actually settle disputes without using state resources, legislatures have transformed an informal process like

mediation into a formal, regulatory tool. Legislatures should approach statutory mediation mandates like any other form of regulation and take care to engineer dispute resolution processes that promote, rather than impede, social welfare and access to justice.